

No. 11397

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

---

E. A. GERETY, WILLIAM HARRAH, CHARLES  
BROWN and HAROLD POOL,

Appellants,

vs.

ABBOT KINNEY COMPANY,

Appellee.

---

TRANSCRIPT OF RECORD

(In Two Volumes)

VOLUME I

(Pages 1 to 304, Inclusive)

Upon Appeal from the District Court of the United States  
for the Southern District of California,  
Central Division

---

FILED

OCT 23 1968

PAUL P. O'BRIEN,  
CLERK



**No. 11397**

IN THE

**United States Circuit Court of Appeals**

FOR THE NINTH CIRCUIT

---

E. A. GERETY, WILLIAM HARRAH, CHARLES  
BROWN and HAROLD POOL,

Appellants,

vs.

ABBOT KINNEY COMPANY,

Appellee.

---

**TRANSCRIPT OF RECORD**

(In Two Volumes)

**VOLUME I**

(Pages 1 to 304, Inclusive)

Upon Appeal from the District Court of the United States  
for the Southern District of California,  
Central Division

---



## INDEX.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italics; and likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

	Page
Affidavit of Harold B. Pool.....	176
Affidavit of Harold B. Pool in Support of Motion to Dismiss .....	149
Amended Stipulation and Order Approving Same.....	167
Answer of Alleged Bankrupt.....	8
Answer of Alleged Bankrupt, Amended.....	141
Answer of Charles Brown to Petition and Order to Show Cause .....	31
Answer of E. A. Gerety to Petition and Order to Show Cause .....	35
Answer of William Harrah to Petition and Order to Show Cause .....	39
<b>Appeal:</b>	
Notice of .....	193
Statement of Points on Which They Intend to Rely on (Circuit Court).....	613
Bankrupt's Exhibits (See Index to Exhibits)	
Brown's Exhibits (See Index to Exhibits)	
Certificate of Clerk.....	195
Creditors' First Amended Involuntary Petition in Bankruptcy .....	5
Creditors' Petition in Bankruptcy.....	2

Gerety's Exhibits (See Index to Exhibits)	
Memorandum Order of District Court, Dated May 27, 1946 .....	178
Motion for Dismissal and Notice of Hearing Thereon..	145
Motion to Dismiss Involuntary Petition.....	163
Names and Addresses of Attorneys.....	1
Notice of Appeal.....	193
Notice of Motion on Petition to Intervene.....	139
Objection of Charles Brown to Jurisdiction of Court in re Order to Show Cause, Dated July 7, 1945.....	42
Objection of E. A. Gerety to Jurisdiction of Court in re Order to Show Cause, Dated July 7, 1945.....	43
Order by District Court, Dated December 14, 1945.....	144
Order Directing Payment of Money to the Clerk of the Court .....	172
Order on Review From Order of the Referee, etc.....	185
Order Permitting Bankrupt to File Amended Answer..	177
Order to Show Cause.....	29
Petition for Review of Referee's Order.....	45
Exhibit A:	
Referee's Findings of Fact and Conclusions of Law .....	61
Referee's Order Directing Clerk of the Court to Pay Monies on Deposit to Abbot-Kinney Com- pany et al., and Determining Title to Sprinkling System .....	76
Exhibit B: Objections of Charles Brown to Juris- diction of This Court in re Order to Show Cause, Dated July 7, 1945.....	80

Petition in Intervention in Opposition to Amended Involuntary Petition .....	131
Petition of Alleged Bankrupt for Order to Show Cause .....	17
Exhibit A: Amended Stipulation and Order Approving Same .....	24
Points and Authorities in Support of Motion to Intervene .....	174
Referee's Certificate on Petition for Review of Order in re Disposition of Money Held by Clerk of Court....	10
Report of Special Master on Involuntary Petition in Bankruptcy .....	151
Reporter's Transcript of Proceedings.....	196
Testimony on Behalf of Petitioning Creditors:	
Brown, Charles J.—	
Direct examination .....	212
Darling, Hugh—	
Direct examination .....	385
Cross-examination .....	396
Redirect examination .....	403
Recross-examination .....	408
Redirect examination .....	411
Gerety, Edward A.—	
Direct examination .....	433
Halper, Louis—	
Direct examination .....	508
Cross-examination .....	517

Reporter's Transcript of Proceedings	Page
Testimony on Behalf of Petitioning Creditors:	
Harrah, John—	
Direct examination .....	296
Cross-examination .....	377
Cross-examination (recalled) .....	412
Redirect examination .....	418
Recross-examination .....	423
Kinney, Carleton—	
Direct examination .....	467
Newton, Alfred Arthur—	
Direct examination .....	487
Cross-examination (recalled) .....	531
Redirect examination .....	557
Recross-examination .....	559
Testimony on Behalf of Respondents:	
Brown, Charles J.—	
Direct examination .....	569
Cross-examination .....	573
Gerety, Edward A.—	
Direct examination .....	574
Cross-examination .....	582
Harrah, John—	
Direct examination .....	563
Pool, Harold B.—	
Direct examination .....	426
Stipulation and Order Approving Same, Amended.....	
167	
Statement of Points on Which They Intend to Rely on	
This Appeal, Appellants' (Circuit Court).....	613

## INDEX TO EXHIBITS.

Bankrupt's Exhibits:

No.	Page
1. Agreement, dated June 2, 1931, with supplemental agreements attached (In Evidence).....	211
(In Transcript) .....	82
2. Assignment, dated March 4, 1944 (In Evidence) .....	259
(In Transcript) .....	104
3. Canceled check made payable to Chas. J. Brown, dated March 4, 1944 (In Evidence).....	267
(In Transcript) .....	106
4. Letter, dated November 6, 1944, signed by Chas. J. Brown (In Evidence).....	271
(In Transcript) .....	107
5. Canceled check made payable to Chas. J. Brown, dated November 8, 1944 (In Evidence).....	277
(In Transcript) .....	108
6. Letter, dated November 30, 1944, signed Wm. Harrah (In Evidence).....	293
(In Transcript) .....	109
7. Letter, dated June 6, 1944, to Abbot-Kinney Co., signed by H. B. Dorr (In Evidence).....	336
(In Transcript) .....	110
8. Canceled check, dated November 25, 1944, made payable to Chas. J. Brown (In Evidence).....	376
(In Transcript) .....	112

Gerety's Exhibit:

No.	
1. Copy of Agreement, dated December 23, 1937 (In Evidence) .....	401
(In Transcript) .....	122

## Brown's Exhibits:

No.	Page
1. Bank statement from May 2, 1944, through June (In Evidence).....	570
(In Transcript) .....	113
2. Letter, signed by Security-First National Bank (In Evidence) .....	571
(In Transcript) .....	117
3. Countercheck on Security-First National Bank, dated March 2, 1944, amount \$3500 (In Evidence) .....	571
(In Transcript) .....	119
4. Receipt signed by Hugh Darling and Charles Brown (In Evidence).....	571
(In Transcript) .....	120





NAMES AND ADDRESSES OF ATTORNEYS:

For Appellants:

LESLIE L. HEAP

829 Citizens National Bank Building  
Los Angeles 13, Calif.

D. M. KITZMILLER

610 Rowan Building  
Los Angeles 13, Calif.

COBB & UTLEY

639 South Spring Street  
Los Angeles 14, Calif.

For Appellee:

GRAINGER AND HUNT

830 H. W. Hellman Building  
354 South Spring Street  
Los Angeles 13, Calif. [1\*]

\*Page number appearing at foot of Certified Transcript.

In the District Court of the United States  
Southern District of California  
Central Division

In Bankruptcy No. 43551-O'C.

In the Matter of ABBOT KINNEY COMPANY, a  
California Corporation, an Alleged Bankrupt.

#### CREDITORS' PETITION

To the Honorable ..... , Judge of  
the District Court of the United States, for the  
Southern District of California:

The petition of Frank Williams, Moses C. Davis, and  
Charles W. Cradick, respectfully shows:

1. That Abbot Kinney Company is a corporation organized under the laws of the State of California and that it is a business corporation and is not a municipal, railway, insurance or banking corporation or a building and loan association.
2. That the said Abbot Kinney Company has for the greater portion of the six months next preceding the date of the filing of this petition, had its principal place of business at the Venice Pier in the City of Los Angeles, County of Los Angeles, State of California, in said district.
3. That the said Abbot Kinney Company owes debts to the amount of \$1000.00 and over, and is insolvent.

4. That the petitioners are creditors of said Abbot Kinney Company, having proveable claims against it, which amount in the aggregate, in excess of the value of securities held by them, to \$500.00.

5. That the nature and amount of your petitioners' claim and the securities held by them, are as follows: That on the 1st day of April, 1931, Abbot Kinney Company issued its Trust Indenture, securing an authorized issue of \$350,000.00 First Mortgage 7% Sinking Fund Gold Bonds, which Gold Bonds, under the terms of said Trust Indenture, were due April 1, 1944. That at the present time, there is still outstanding, \$269,000.00 of said bonds. That interest on said bonds has not been paid since April 1, 1932, other than the sum of \$10,000.00 per [2] \$1000.00 bond. That there is presently due in interest on said outstanding bonds, a sum in excess of \$225,000.00. That your petitioners own together, in excess of \$75,000.00 of the face amount of said bonds. That said bonds have been long in default; that in addition to the bonds outstanding, as aforesaid, the Abbot Kinney Company owes taxes which are liens against the property securing the above described Gold Bonds in a sum in excess of \$76,000.00. That the total amount due on said bonds for principal and interest is in excess of \$500,000.00. That the total reasonable market value of all of the assets of the Abbot Kinney Company, including all of the property covered by the above mentioned Trust Indenture, does not equal \$400,000.00. That your peti-

tioners do not waive the security which they hold under the Trust Indenture above referred to; that the assets securing said bonds, have a value of at least \$100,000.00 less than the total amount presently due on said bonds.

6. That within four months preceding the filing of this petition, viz.: on the 23rd day of June, 1944, the said Abbot Kinney Company, while insolvent, committed an act of bankruptcy in that it did pay to one Charles J. Brown and others, the sum of \$7500.00 on a debt which had been owing to said Charles J. Brown and others and their assignor, for more than ten years, which payment was made for the purpose and with the intent of preferring said Charles J. Brown and others, over the other creditors of said Abbot Kinney Company.

Wherefore, your petitioners pray that service of this petition, with the subpoena, may be made upon Abbot Kinney Company, as provided by said bankruptcy law of 1898 as amended, and that it may be adjudged bankrupt within the purview of such law.

FRANK WILLIAMS  
MOSES C. DAVIS  
CHARLES W. CRADICK  
Petitioners

NICHOLAS & DAVIS

By M. Philip Davis

Attorneys for Petitioners [3]

[Verified.]

[Endorsed]: Filed Oct. 21, 1944. [4]

[Title of District Court and Cause.]

CREDITORS' FIRST AMENDED INVOLUNTARY  
PETITION

To the Honorable J. F. T. O'Connor, Judge of the District Court of the United States, for the Southern District of California:

The first amended involuntary petition of Frank Williams, Moses C. Davis and Charles W. Cradick, respectively shows:

1. That Abbot Kinney Company is a corporation organized and existing under the laws of the State of California and that it is a business corporation and is not a municipal, railway, insurance or banking corporation, or a building and loan association.
2. That the said Abbot Kinney Company has for more than 25 years next preceding the date of the filing of the original involuntary petition in the above entitled matter, had its principal place of business at the Venice Pier in the City of Los Angeles, County of Los Angeles, State of California, in said district.
3. That the said Abbot Kinney Company owes debts in excess of \$100,000.00 and is insolvent and is not a wage earner or farmer.
4. That each of the petitioners are creditors of said Abbot Kinney Company, each having a provable general unsecured claim against Abbot Kinney Company fixed as

to liability and liquidated in amount, which, in the aggregate, amounts to more than \$500.00 over and above the value of securities held by each of them.

5. That the nature and amount of your petitioners' claim and the securities held by them, are as follows: That on the 1st day of April, 1931, Abbot Kinney Company issued its Trust Indenture, securing an authorized issue of \$350,000.00 First Mortgage 7% Sinking Fund Gold Bonds, which Gold Bonds, under the terms of said Trust Indenture, were due April 1, 1944. That there [5] is presently outstanding and unpaid, \$269,000.00 principal amount of said bonds. That there is presently due in interest on said outstanding bonds, a sum in excess of \$225,000.00. That the Abbot Kinney Company also owes taxes which are liens against the property securing said unpaid bonds, in a sum in excess of \$75,000.00. That the total reasonable market value of all of the assets of Abbot Kinney Company securing the payment of said outstanding bonds, is less than \$400,000.00. That the assets of Abbot Kinney Company securing said unpaid bonds, have a value of at least \$100,000.00 less than the total amount of principal and interest presently due on said bonds. That your petitioner Frank Williams owns more than \$75,000.00 of the face amount of said unpaid bonds and your petitioners, Moses C. Davis and Charles W. Cradick, each own not less than \$1,000.00 of the face amount of said unpaid bonds. That your petitioners do not waive the security for said bonds.

6. That within four months preceding the filing of the original involuntary petition in the above entitled matter, viz., on the 23rd day of June, 1944, the said Abbot Kinney Company, while insolvent, committed an act of bankruptcy in that it did pay out of its assets, to Charles Brown, Ed Gerety and so plaintiff is informed and believes and upon that ground alleges, to William Harrah and John Harrah, the sum of \$7500.00 on an antecedent debt due them by Abbot Kinney Company, which payment was made for the purpose and with the intent of preferring said Charles Brown, Ed Gerety, William Harrah and John Harrah, over the other creditors of said Abbot Kinney Company.

Wherefore, your petitioners pray that service of this petition, with the subpoena, may be made upon Abbot Kinney Company, as provided by said bankruptcy law of 1898 as amended, and that it may be adjudged bankrupt within the purview of such law.

FRANK WILLIAMS  
MOSES C. DAVIS  
CHARLES W. CRADICK  
Petitioners

NICHOLAS & DAVIS

By M. Philip Davis

Attorneys for Petitioners [6]

[Verified.]

[Endorsed]: Filed Mar. 1, 1945. [7]

[Title of District Court and Cause.]

ANSWER OF ALLEGED BANKRUPT.

To the Honorable J. F. T. O'Connor, Judge of District Court of the United States, for the Southern District of California:

A petition having been filed in the above entitled court on the 21st day of October, 1944, praying that your respondent, the alleged bankrupt above named, be adjudged a bankrupt, and, having thereafter filed herein, on the 28th day of February, 1945, its first amended petition, your respondent now appears and answers the said amended petition as follows:

1. Respondent admits the allegations contained in paragraphs 1, 2 and 6 of said first amended involuntary petition.
2. Respondent denies each and every allegation contained in paragraph 3 of said first amended involuntary petition, except that it admits it is not a wage earner or a farmer.
3. Respondent denies each and every allegation contained in paragraph 4 of the said first amended involuntary petition, except that it admits that each of the petitioning creditors is a creditor of the respondent.
4. Respondent denies each and every allegation contained in paragraph 5 of said amended involuntary petition, except that it admits that on the 1st day of April,

1931, the alleged bankrupt issued its trust indenture securing an authorized issue of \$350,000 First Mortgage 7% Sinking Fund Gold Bonds, which bonds, under the terms of said trust indenture, were due April 1, 1944, and there is pre- [8]sently outstanding and unpaid \$269,000, principal amount of said bonds. Respondent further admits that there is presently due in interest on said outstanding bonds, a sum in excess of \$225,000. Respondent further admits that the alleged bankrupt also owes taxes, which are liens against the property securing the said bonds, in a sum in excess of \$75,000.

5. Wherefore, your respondent prays that a hearing may be had on the said amended petition and this answer, and that the issues presented thereby may be determined by a jury, and for general relief.

ABBOT KINNEY COMPANY

By W. Thos. Davis

Its President

Respondent

GRAINGER & HUNT

By Reuben G. Hunt

Attorneys for Respondent

[Verified.]

[Endorsed]: Filed Mar. 13, 1945. [9]

[Title of District Court and Cause.]

Appearances:

Grainger & Hunt and Nicholas & Davis, 634 South Spring St., Los Angeles 14, Calif., Attorneys for Alleged Bankrupt.

Cobb & Utley, 639 South Spring St., Los Angeles 14, Calif., Attorneys for Charles Brown.

D. M. Kitzmiller, 610 Rowan Bldg., Los Angeles 13, Calif., Attorney for E. A. Gerety.

Leslie L. Heap, 829 Citizens National Bank Bldg., Los Angeles 13, Calif., Attorney for William Harrah.

REFEREE'S CERTIFICATE ON PETITION FOR  
REVIEW OF ORDER IN RE DISPOSITION  
OF MONEY HELD BY CLERK OF COURT

To the Honorable J. F. T. O'Connor, Judge of the above entitled Court:

I, Benno M. Brink, one of the Referees in Bankruptcy of this Court, before whom the above entitled matter is pending, do hereby certify to the following:

Charles Brown, E. A. Gerety and William Harrah have filed their petition for the review of an order made by your Referee in this matter on August 23, 1945, in which he directed the disposition of the sum of \$30,000.00 now held by the Clerk of this Court, pursuant to a stipulation entered into by the parties in [10] interest and approved by the Court.

The Proceedings

An involuntary petition in bankruptcy was filed in this matter against the alleged bankrupt on October 21, 1944. It is still pending and undetermined. Shortly after the filing of the said involuntary petition and on or about November 8, 1944, two of the three members of the "Executive Committee" of the alleged bankrupt paid to Charles Brown, one of the petitioners on review, \$30,000.00 of the alleged bankrupt's money on a certain "sprinkler" contract upon which the alleged bankrupt was then obligated.

Brown had secured an assignment of the seller's interest in the said contract in June of 1944 for \$15,000.00 and shortly thereafter the aforesaid same two members of the "Executive Committee" had paid him \$7500.00 of the alleged bankrupt's money thereon. The said contract was made in 1931 and, when Brown secured his aforesaid assignment, nothing had been paid on the contract since 1932 although the balance owing thereon appeared to be \$137,000.00.

A controversy arose over the payment of the aforesaid sum of \$30,000.00 and by stipulation of the parties in interest, approved by the Court, the money was placed in the custody of the Clerk of this Court as a Court of Bankruptcy.

This proceeding was first referred to Referee Hugh L. Dickson, one of the Referees in Bankruptcy of this Court. On July 7, 1945, upon the petition of the alleged bankrupt, he issued an Order to Show Cause, requiring the petitioners on review and one, John Harrah, one of the two aforesaid members of the "Executive Committee," to

show cause why an order should not be entered, (1) Adjudging the alleged bankrupt to be the owner of the aforesaid "sprinkler" contract and the sprinkling system covered thereby and decreeing that any interest therein, on the part of any of the respondents in the said order to show cause, was held by them [11] in trust for the alleged bankrupt; and (2) Directing the Clerk of the Court to pay to the alleged bankrupt the sum of \$30,000.00 held by him, as aforesaid, and requiring Brown to return to the alleged bankrupt the sum of \$7500.00 which had been paid to him, as aforesaid.

The said John Harrah, one of the respondents named in the said Order to Show Cause, made an oral disclaimer of any interest in the aforesaid contract and in the said sum of \$30,000.00.

The petitioners on review filed written answers to the said Order to Show Cause and the petition upon which it was issued.

Charles Brown and E. A. Gerety, two of the petitioners on review, filed written objections to the jurisdiction of this Court to hear and determine the issues raised by the said Order to Show Cause and the petition upon which it was issued. William Harrah, the remaining petitioner on review orally adopted the said objections to jurisdiction.

The said Order to Show Cause and the said objections to the jurisdiction of this Court came on for hearing before Referee Dickson on July 23, 1945. The said objections to jurisdiction were overruled by him and thereupon it was suggested by one of counsel in the case that Referee Dickson was disqualified by reason of prejudice to proceed with the matter. The said Referee

promptly stated that he was entirely free of any feeling of bias or prejudice in the matter, but that, since the question had been raised, he would, if there was no objection, request your Referee to proceed with the matter. No objection being made, the matter was taken over by your Referee and, in due course, appropriate orders of re-reference were made.

Your Referee began the hearing on the aforesaid Order to Show Cause, the petition upon which it was issued and the answers thereto, on July 24, 1945, and completed the same on July 27, 1945. At the commencement of the hearing the petitioners on review [12] renewed their aforesaid objections to the jurisdiction of this Court which Referee Dickson had overruled, as aforesaid. Your Referee concurred in Referee Dickson's ruling and again overruled the said objections.

At the completion of the hearing on July 27, 1945, your Referee announced his decision from the bench, holding (1) that Brown and anyone associated with him could not collect anything more from the alleged bankrupt on the "sprinkler" contract here involved than Brown had paid for the assignment of the seller's interest therein, to-wit: the sum of \$15,000.00; (2) that, since Brown had been paid \$7500.00 in June of 1944, the \$30,000.00 payment, which was made after the filing of the involuntary petition herein, was valid only to the extent of \$7500.00 and invalid as to the remaining \$22,500.00; (3) that, accordingly, the Clerk of this Court should be directed to pay Brown \$7500.00 and the alleged bankrupt \$22,500.00 of the \$30,000.00 deposited with him; and (4) that whatever interest Gerety and William Harrah might have in the \$7500.00 to be paid to Brown should be asserted

against Brown himself, for the reason that at the time the \$30,000.00 was paid Brown was the only one entitled to collect anything from the alleged bankrupt on the "sprinkler" contract. On August 23, 1945, your Referee signed and filed his formal Findings of Fact and Conclusions of Law and his Order in the matter. It is from this Order that this review is taken.

### The Questions Presented

The questions presented by this view are set forth in the assignments of error which appear on pages 2 to 14, both inclusive, of the petition for review. However, aside from the rulings made by your Referee on the admission of evidence, the essential questions here presented may be summarized as follows:

- (a) Does this Court have jurisdiction to [13] determine the validity and propriety of the payment of \$30,000.00 here involved?
- (b) If this Court does have jurisdiction in the premises, was your Referee correct in holding that Brown, or anyone associated with him, could not collect anything more on the "sprinkler" contract than Brown had paid for the assignment of the seller's interest therein?

### The Evidence

The evidence on the questions here presented is contained in the transcript of the proceedings and in the exhibits, all of which are going up with this certificate.

Findings of Fact, Conclusions of Law and Order

True copies of your Referee's Findings of Fact and Conclusions of Law and Order are attached to the Petition for Review which is going up with this certificate.

Papers Submitted

For the information of the Court the following papers are transmitted herewith:

1. Petition for Order to Show Cause, filed July 7, 1945.
2. Order to Show Cause, filed July 7, 1945.
3. Separate answers of Charles Brown, E. A. Gerety and William Harrah, filed July 23, 1945.
4. Separate objections to jurisdiction, filed by Charles Brown and E. A. Gerety July 23, 1945.
5. Objections to proposed Findings of Fact and Conclusions of Law, filed August 23, 1945.
6. Reporter's transcript of proceedings filed August 31, 1945. (Two volumes.)
7. Petition for Review filed August 31, 1945.
8. The following exhibits:  
Bankrupt's exhibits

1. Agreement dated June 2, 1931, with supplemental agreements attached. [14]
2. Agreement (form of an assignment) dated March 4, 1944.
3. Cancelled check made payable to Charles J. Brown dated November 8, 1944.
4. Letter dated November 6, 1944, signed by Chas. J. Brown.

5. Cancelled check made payable to Charles J. Brown dated November 8, 1944.
6. Letter dated November 30, 1944, signed William F. Harrah.
7. Letter dated June 6, 1944, signed by F. R. Cruikshank & Co. by H. V. Dorr, Secy's-Treas.
8. Cancelled check dated Nov. 25, 1944, made payable to Chas. J. Brown.

Brown's exhibits

1. Bank Statement—Security-First National Bank.
2. Letter dated July 25, 1945, from Security-First National Bank to Charles J. Brown.
3. Cancelled Counter-Receipt dated 3-2-44.
4. Copy of "Receipt" dated June 13, 1944, signed by Charles J. Brown.

Gerety's exhibit

1. Copy of agreement dated December 23, 1937.

The following papers are also transmitted, pursuant to the request of the petitioners on review:

1. Petition in Intervention in Opposition to Amended Involuntary Petition, filed July 19, 1945.
2. Notice of Motion on Petition to Intervene, filed July 19, 1945.
3. Amended Answer of Alleged Bankrupt, filed July 20, 1945.

Note: The Amended Involuntary Petition and the Answer thereto are in the Clerk's file in this matter.

Respectfully submitted this 12th day of September, 1945.

BENNO M. BRINK  
Referee in Bankruptcy

[Endorsed]: Filed Sep. 12, 1945. [15]

[Title of District Court and Cause.]

## PETITION FOR ORDER TO SHOW CAUSE

The petition of Abbott-Kinney Company, a corporation, alleged bankrupt above named, respectfully alleges:

1. That on the 21st day of October, 1944, a petition in involuntary bankruptcy was filed against Abbott-Kinney Company, a corporation, and thereafter on the 28th day of February, 1945, a creditors first amended involuntary petition was filed in said proceeding. An answer has been filed to said first amended involuntary petition, and the matter is now pending before the above entitled Court.
2. That no receiver has been appointed in this proceeding.
3. That on the 2d day of June, 1931, F. R. Cruickshank & Co. entered into a contract with said Abbott-Kinney Company, a corporation, to install at the Pier and on the properties of the Abbott-Kinney Company, a sprinkling system, for a contract price of \$400,000.00. That pursuant to said contract, said sprinkler system [16] was installed. That under said contract, said F. R. Cruickshank & Co. purported to retain title to the sprinkling system until the full payment of the purchase price had been made. That prior to and at the time of the filing of the involuntary petition in bankruptcy herein, and ever since the time of the filing thereof, the alleged bankrupt has been and still is in possession of the said sprinkling system.
4. That Charles Brown, E. A. Gerety, William Harrah, and as petitioner is informed and believes, and there-

fore alleges, John Harrah, claim to hold and own the seller's interest in said sprinkling contract and said sprinkling system, but that said claim of said parties, and each of them, is without foundation, and that any holding of title by said parties, or any of them, is in fact in trust for the alleged bankrupt, and the alleged bankrupt is the real owner of said sprinkling system.

5. That John Harrah has been a director of said Abbott-Kinney Co. ever since the 23d day of December, 1937.

6. That E. A. Gerety was an employee of Abbott-Kinney Co. for many years, and from 1937 until December 13, 1944, was its general manager.

7. That Charles Brown was for many years an employee of said company, and during the year prior to the filing of the petition in bankruptcy was a lessee of said company, and was in and out of the office of said company almost daily and was in constant touch with E. A. Gerety, John Harrah and Carleton Kinney. That said Charles Brown also for many years has been and now is a businesses associate of said John Harrah and William Harrah.

8. That on the 6th day of April, 1938, by action of the Board of Directors of said corporation, an Executive Committee was created to be composed of three members, with authority given to said Committee to carry on the business of the company during the intervals between the meetings of the Board of Directors. That from the 16th day of November, 1938, until the 13th day of No-

vember, 1944, the mem- [17] bers of said Executive Committee were John Harrah, Carleton Kinney and Alfred Newton.

9. That at all times in all matters relating to said corporation, wherein William Harrah was interested, said John Harrah was agent for him, and acted for him as such agent.

10. That the asserted claim of said E. A. Gerety, Charles Brown, William Harrah, and John Harrah, as aforesaid, to the sprinkling system and the said F. R. Cruickshank contract arose in the following manner: During January, 1943, said F. R. Cruickshank Co. offered to accept the sum of \$10,000.00 in full settlement upon its contract, upon which contract, the said Cruickshank Co. then claimed there was a balance owing of \$137,000.00. That a meeting of the Executive Committee was held to consider the offer, there being present Alfred Newton and John Harrah, Carleton Kinney being absent. Said John Harrah voted not to accept the offer, saying that the contract was worthless. Alfred Newton voted to accept the offer, but the motion to accept the offer was lost by virtue of a majority of the committee failing to vote for the acceptance. In May, 1944, said Cruickshank Co. again offered to accept \$10,000.00 in full settlement of its said contract, and its rights thereunder, upon which contract there was then the sum of \$137,000.00 claimed by Cruickshank Co. to be owing. Said John Harrah and Carleton Kinney, whom your petitioners be-

lieve and therefore allege was at said time under the dominance of said John Harrah, refused the said offer saying that the contract was worthless.

Said corporation at the time each said offer was made by the said Cruickshank Co. to cancel or dispose of its interest in said sprinkling contract for \$10,000.00 was financially able to pay the sums required by said Cruickshank Co. for the cancellation or transfer of the said contract, and would have done so, except for the said machinations herein set forth of said John Harrah, and the said E. A. Gerety, William Harrah and Charles Brown. [18]

10. On or about the Monday following the said refusal to accept said offer, Charles Brown purported to purchase said F. R. Cruickshank Co.'s sprinkling contract for the sum of \$15,000.00. On November 25, 1944, petitioner received a letter from William Harrah in which he stated he had purchased a one-third interest in the said sprinkling contract. Immediately after the said contract was assigned to said Charles Brown by the Cruickshank Co., to-wit, on the 7th day of June, 1944, at a meeting of the executive committee at which said John Harrah and Carleton Kinney were present, Alfred Newton being absent, it was ordered that \$7500.00 be paid by the corporation on the said sprinkling contract to said Charles Brown, and thereupon the said sum was so paid. That thereafter on the 7th day of November, 1944, and after the filing of the petition in bankruptcy herein at a meeting of the said executive committee, at which meeting

Carleton Kinney and John Harrah were present, and Alfred Newton being absent, it was directed that the sum of \$30,000.00 be paid to Charles Brown on said sprinkler contract, and thereupon such sum of \$30,000.00 was so paid to him. That said sum of \$30,000.00 so paid was in the possession of the alleged bankrupt at the time of the filing of said petition, and thereafter until it was paid to said Charles Brown, leaving purportedly to be paid under said contract a sum of \$80,000.00.

11. Petitioner is further informed and believes and therefore alleges that in purportedly purchasing said contract and the rights of the seller thereunder, said Charles Brown for convenience and as a "dummy" took in his own name the purported interest of said John Harrah, William Harrah, and E. A. Gerety, with the secret understanding that he would hold such interest for them; and petitioner is likewise informed and believes and therefore alleges that taking of the alleged title in the name of said Charles Brown was likewise for the purpose of concealing the interest of the said other parties in and to said purported purchase.

12. That petitioner is informed and believes and there-  
[19] fore alleges that said Carleton Kinney at all of said times was under the dominance of said John Harrah, and acted as said John Harrah directed.

13. That each and all of the said parties had full knowledge of all of the matters and things herein alleged.

14. That all of said acts of said Charles Brown, E. A. Gerety, William Harrah and John Harrah as set forth in the preceding paragraphs in connection with the acquisition of said sprinkling system contract and the payment thereon were in violation of the fiduciary obligations and duties owing by said individuals to said corporation, and were done with full knowledge by each of said parties of his own fiduciary obligations and duties to the said corporation, and the fiduciary duties and obligations of each of the other parties to the said corporation. That all of said acts were done for the purpose of and with the intent of defrauding and cheating the said corporation and its creditors and estate, and for the benefit of said individuals, and said parties did in the manner hereinbefore set forth cheat and defraud the said Abbott Kinney Co.

15. That after said sum of \$30,000.00 was paid as aforesaid to said Charles Brown, in accordance with the stipulation of the parties, a copy of which is attached hereto, marked "Exhibit A" and made a part hereof, the said sum of \$30,000.00 was deposited with the Clerk of this Court.

16. That petitioner offers to do equity as the Court may direct in the premises.

17. That said sums of \$7500.00 and \$30,000.00 wrongfully paid to said Charles Brown in the manner hereinbefore set forth should be ordered paid over to the alleged bankrupt and its estate.

Wherefore, petitioner prays that an order to show cause issue herein, directing Charles Brown, E. A. Gerety, William Harrah, and John Harrah, and each of them, to be and appear before this Court at a time and place therein mentioned, then and there [20] to show cause why an order should not be made, adjudging and decreeing:

1. That the alleged bankrupt is the owner of such sprinkling system and the said F. R. Cruickshank contract, free from any claim of said parties or any of them;
2. That any title held by said parties, or any of them, be decreed to be in trust for the alleged bankrupt, and that said parties be ordered to execute such instruments as will show title to be in the alleged bankrupt;
3. That the sum of \$30,000.00 paid to Charles Brown as in this petition alleged, and thereafter deposited with the Clerk of this Court be delivered to the alleged bankrupt as its property, and that the sum of \$7500.00 paid by said alleged bankrupt to said Charles Brown as in this petition alleged be returned to the alleged bankrupt and petitioner further prays that upon the hearing of said order to show cause that such order be made and entered herein.

Dated this 5th day of July, 1945.

ABBOTT-KINNEY COMPANY, a corporation  
By W. Thos. Davis

GRAINGER AND HUNT

By Kyle Z. Grainger

Attorneys for Alleged Bankrupt [21]

## EXHIBIT A

In the District Court of the United States  
Southern District of California  
Central Division

No. 43,551 O'C. In Bankruptcy

In the Matter of ABBOTT KINNEY COMPANY, a  
corporation, Alleged Bankrupt.

AMENDED STIPULATION AND ORDER  
APPROVING SAME

The petitioning creditors in the above entitled involuntary proceeding in bankruptcy, the alleged bankrupt, and Charles J. Brown, having signed and filed herein a stipulation, approved by the Court, concerning the disposition of \$30,000.00 now held by Charles J. Brown, and it appearing that the terms and conditions of the said stipulation should be clarified in order to make plainer the intentions of the parties,

It is hereby agreed that the said stipulation shall be amended to read as follows:

Whereas, an involuntary petition in bankruptcy has been filed in the above entitled proceeding in the above-entitled court against the above named alleged bankrupt and is now pending; and

Whereas, the petitioning creditors therein have heretofore filed therein a petition for an order requiring the said Charles J. Brown to pay over to the estate of the alleged bankrupt the said sum of \$30,000.00, which the alleged bankrupt contends was unlawfully paid to the said Charles J. Brown out of such estate subsequent to the filing of

the said involuntary petition, and an order to show cause thereon has been issued against the said Charles J. Brown, and said petition and order to show cause are now pending before the above-entitled; and

Whereas, the said Charles J. Brown has filed herein a petition for the appointment of a receiver in bankruptcy prior to [22] adjudication, and such petition is now pending before the above-entitled court; and

Whereas, the above-entitled proceeding has been referred by the court generally for administration by its order to Hugh L. Dickson, a referee in Bankruptcy of said court, pursuant to the provisions of Section 22 of the National Bankruptcy Act of 1898, as amended; and

Whereas, a dispute has arisen between the alleged bankrupt and Charles J. Brown with respect to the cancellation by said alleged bankrupt of certain leases held by the said Charles J. Brown,

Now, Therefore, It Is Hereby Stipulated and Agreed as Follows:

1. The said petition of Charles J. Brown for the appointment of a receiver in bankruptcy may be denied without prejudice, and the bond heretofore posted by the said Charles J. Brown, pursuant to the provisions of Section 3-(e) of the said Bankruptcy act, shall be exonerated.

2. The said petition for an order requiring the said Charles J. Brown to pay back the said sum of \$30,000.00,

shall be denied, and the said order to show cause issued thereon, shall be discharged, both without prejudice.

3. The said Charles J. Brown shall pay over to the Clerk of the above entitled Court, as a court of bankruptcy, the said sum of \$30,000.00, to be impounded and held by him, pursuant to the provisions of Sections 851 and 852 of the Judicial Code of the United States, under the following terms and conditions:

(a) The pending motion by the alleged bankrupt to dismiss the said involuntary petition shall be reset for hearing upon the court calendar at the earliest possible date in February, 1945, but not later than February 16, 1945, and thereafter proceedings to determine the sufficiency of the said involuntary petition, or amendments thereto, shall be prosecuted with due diligence, and all other [23] matters pertaining to the determination of the solvency or insolvency of the alleged bankrupt, and the commission by it of an act, or acts, of bankruptcy, shall likewise be prosecuted with due diligence. Nothing herein contained shall be deemed to prevent the alleged bankrupt from commencing herein a proceeding under Chapter X or XI of the Bankruptcy Act.

(b) Each of the parties hereto shall be given notice in writing of the time and place of all hearings in the above-entitled proceeding at least five days prior to any such hearing.

(c) In the event the above-entitled involuntary proceeding is finally dismissed, the said sum of \$30,000.00 shall

be returned by the said Clerk to the said Charles J. Brown without deduction of any amount whatever, unless, prior to the ten days after such final order or dismissal, the alleged bankrupt shall serve upon the parties hereto, and file herein, an application that the said sum of \$30,000.00 or a part thereof, shall be paid over to it, in which event the said sum shall be retained by the said Clerk and disbursed by him to the person or persons whom the above-entitled court shall finally determine is or are entitled thereto after due hearing upon notice to the parties hereto, or, if the said court shall decide that it does not have jurisdiction to determine who is entitled thereto, then, and in that event, the said sum shall be returned by the said Clerk to the said Charles J. Brown without any deduction therefrom whatsoever, without prejudice.

(d) In the event a final order of adjudication is made in the above-entitled proceeding, or a final order is made approving the commencement of a Chapter X or XI proceeding under the Bankruptcy Act, the said sum of \$30,000.00 shall be paid over by the said Clerk to the receiver in Bankruptcy, the trustee in bankruptcy, or the debtor-in-possession herein, as the case may be, unless prior to ten days after such final order of adjudication, the said Charles J. Brown shall serve upon the parties hereto, and file herein, an application that the said sum of \$30,000.00, or a part thereof, shall [24] be paid over to him, in which event the said sum shall be retained by

the said Clerk and disbursed by him to the person or persons whom the above-entitled court shall finally determine is or are entitled thereto after due hearing upon notice to the parties hereto.

(e) Pending the determination by the above-entitled trial court of all the matters above set forth, the alleged bankrupt shall not take any further action whatsoever in the matter of the cancellation of any lease, or purported lease between the alleged bankrupt, as lessor, and Charles J. Brown, as lessee, by reason of any cause now existing, as set forth in notices of cancellation dated December 21, 1944.

Dated: This 8 day of January, 1945.

H. B. POOL & HIRAM E. CASEY

By H. B. POOL

Attorneys for Charles J. Brown

GRAINGER AND HUNT

By REUBEN G. HUNT

Attorneys for Alleged Bankrupt

NICHOLAS & DAVIS

By WM. HOWARD NICHOLAS

Attorneys for Petitioning Creditors [25]

[Verified.]

[Endorsed]: Filed Jul. 7, 1945, at 30 min. past 11 o'clock A. M. Hugh L. Dickson, Referee; Clerk JB.

[Endorsed]: Filed Sep. 12, 1945. [26]

[Title of District Court and Cause.]

### ORDER TO SHOW CAUSE

Abbott-Kinney Company, a corporation, the alleged bankrupt above named, having filed herein a duly verified petition praying that the hereinafter order to show cause issue, now, therefore, no adverse interests appearing thereat, on motion of Grainger and Hunt, counsel for said alleged bankrupt,

It Is Ordered that Charles Brown, E. A. Gerety, William Harrah, and John Harrah, and each of them, be and they are hereby directed to appear before Hugh L. Dickson, Referee in Bankruptcy, at his Court Room at 339 Federal Building, Los Angeles, California, on the 16th day of July, 1945, at the hour of 10:00 o'clock in the forenoon of said day, then and there to show cause, if any there be, why an order should not be made and entered herein, adjudging and decreeing:

1. That the alleged bankrupt is the owner of that certain sprinkling system installed by F. R. Cruickshank & Co., and is likewise the owner of the F. R. Cruickshank & Co. contract relating thereto, free [27] from any claim of said parties or any of them;
2. That any title held by said parties, or any of them, be decreed to be in trust for the alleged bankrupt, and that said parties be ordered to execute such instruments as will show title to be in the alleged bankrupt;
3. That the sum of \$30,000.00 paid to Charles Brown by the alleged bankrupt, and thereafter deposited with the Clerk of this Court, be delivered to the alleged bank-

rupt as its property, and that the sum of \$7500.00 paid by said alleged bankrupt to said Charles Brown in connection with the F. R. Cruickshank & Co. contract be returned to the alleged bankrupt.

It Is Further Ordered that service of the within order to show cause may be made upon the respondents in the following manner, to-wit:

By any citizen of the United States, over the age of 21 years, and not a party to the within proceeding, by serving a copy of the within order and a copy of the petition upon which it is based upon Charles Brown, E. A. Gerety, and John Harrah at least five days prior to the date of hearing on said order to show cause.

With respect to William Harrah, service may be made upon him in the same manner, or service may be made upon him, by placing a true copy of said order and the petition upon which it is based in an envelope addressed to said William Harrah, at Reno, Nevada, and by then sealing said envelope and depositing the same, registered mail, with postage thereon fully prepaid, in the United States Post Office at Los Angeles, California, at least six days prior to the date of hearing and if such service is made by mail, A. O. Carver is hereby designated to make such service.

Dated this 7th day of July, 1945.

HUGH L. DICKSON  
Referee in Bankruptcy

[Endorsed]: Filed Jul. 7, 1945, at 30 min. past 11 o'clock A. M. Hugh L. Dickson, Referee; Clerk JB.

[Endorsed]: Filed Sep. 12, 1945. [28]

[Title of District Court and Cause.]

ANSWER OF CHARLES BROWN TO PETITION  
AND ORDER TO SHOW CAUSE DATED  
JULY 7, 1945

Now comes respondent Charles Brown, and without waiving his objections to the jurisdiction of the above entitled court on file herein, admits and denies in respect to the petition for an order to show cause on file, as follows:

I.

Admits all of the allegations contained in paragraph 1, except that said involuntary petitions referred to constitute valid petitions in bankruptcy, and alleges the true facts to be that said amended involuntary petition does not state facts sufficient to constitute an act of bankruptcy or to invoke the jurisdiction of this court.

II.

Admits the allegations contained in paragraph 2.

III.

For answer to paragraph 3, admits the allegations therein contained.

IV.

For answer to paragraph 4, denies each and every allegation [29] contained in paragraph 4, except that Charles Brown, E. A. Gerety and William Harrah own said conditional sales contract referred to in said petition, and the legal title to all personal property described therein.

## V.

Admits the allegations contained in paragraph 5.

## VI.

Admits the allegations contained in paragraph 6.

## VII.

For answer to paragraph 7, admits the allegations contained therein except that Charles Brown is a business associate of said John Harrah and William Harrah.

## VIII.

For answer to paragraph 8, admits the allegations contained therein.

## IX.

For answer to paragraph 9, admits the allegations contained therein.

## X.

For answer to paragraph 10, this answering respondent denies each and every allegation contained therein, and alleges the true facts to be that Charles Brown and E. A. Gerety, after negotiating with the attorney for the F. R. Cruickshank Co., purchased said conditional sales contract for the sum of \$15,000.00. That prior to the purchase by them negotiations had been had at different times between the attorney for the Cruickshank company and officers and directors of the Abbot Kinney Company to compromise the amount due under said conditional sales contract, but that said alleged bankrupt did not have the funds with which to pay the demand of the Cruickshank company or neglected to make any settlement thereof.

For answer to paragraph 10 on page 4, this answering respondent denies each and every allegation contained therein, except that Charles Brown and E. A. Gerety purchased for \$15,000.00 said [30] conditional sales contract, and that on June 7, 1944 and prior thereto demanded of the alleged bankrupt that a payment be made upon said contract and that an arrangement be worked out to pay the balance due thereon in installments, and that said alleged bankrupt agreed, in consideration of an extension of time, to pay the sum of \$7,500.00 and thereafter on November 7, 1944 to pay an additional \$30,000.00. That thereafter said sums were paid as agreed upon and that the payment on November 7, 1944 was after the filing of the purported involuntary petition in bankruptcy. That the unpaid balance upon said contract is the sum of \$80,000.00.

## XI.

For answer to paragraph 11, this answering respondent denies each and every allegation therein contained.

## XII.

For answer to paragraph 12, this answering respondent denies each and every allegation therein contained.

## XIII.

For answer to paragraph 13, this answering respondent denies each and every allegation therein contained.

## XIV.

For answer to paragraph 14, this answering respondent denies each and every allegation therein contained.

## XV.

For answer to paragraph 15, this answering respondent admits the allegations therein contained.

## XVI.

For answer to paragraph 16, this answering respondent denies each and every allegation therein contained.

## XVII.

For answer to paragraph 17, this answering respondent denies each and every allegation therein contained. [31]

Wherefore this answering respondent prays that this court dismiss the above entitled proceeding and enter such an order in that connection as is just and proper in the premises.

CHARLES BROWN

Respondent

COBB & UTLEY

By Francis B. Cobb

Attorneys for Respondent [32]

[Verified. [33]]

[Endorsed]: Filed Jul. 23, 1945 at ..... min. past 10 o'clock A. M. Hugh L. Dickson, Referee; Clerk JB.

[Endorsed]: Filed Sep. 12, 1945. [34]

[Title of District Court and Cause.]

ANSWER OF E. A. GERETY TO PETITION AND  
ORDER TO SHOW CAUSE DATED JULY 7,  
1945

Now comes respondent E. A. Gerety, and without waiving his objections to the jurisdiction of the above-entitled court on file herein, admits and denies, in respect to the petition for an order to show cause on file, as follows:

I.

Admits all the allegations contained in paragraph 1, except that said involuntary petitions referred to constitute valid petitions in bankruptcy, and alleges the true facts to be that said amended involuntary petition does not state facts sufficient to constitute an act of bankruptcy or to invoke the jurisdiction of this court.

II.

Admits the allegations contained in paragraph 2.

III.

For answer to paragraph 3, admits the allegations therein contained.

IV.

For answer to paragraph 4, denies each and every [35] allegation contained in paragraph 4, except that Charles Brown, E. A. Gerety, and William Harrah own said conditional sales contract referred to in said petition and the legal title to all personal property described therein.

## V.

Admits the allegations contained in paragraph 5.

## VI.

Admits the allegations contained in paragraph 6.

## VII.

For answer to paragraph 7, admits the allegations contained therein except that Charles Brown is a business associate of said John Harrah and William Harrah and respondent denies this particular allegation.

## VIII.

For answer to paragraph 8, admits the allegations contained therein.

## IX.

Respondent has no information or belief on the subject sufficient to enable him to answer the allegations of paragraph 9, and basing his denial on that ground denies generally and specifically each and every allegation therein contained.

## X.

For answer to paragraph 10, this answering respondent denies each and every allegation contained therein, and alleges the true facts to be that Charles Brown and E. A. Gerety, after negotiating with the attorney for the F. R. Cruickshank Co., purchased said conditional sales contract for the sum of \$15,000.00. That prior to the purchase by them negotiations had been had at different times between the attorney for the Cruickshank company and officers and directors of the Abbot Kinney Company to compromise the amount due under said conditional sales contract, but that said alleged bankrupt did not have

the funds with which to pay the demand of the [36] Cruickshank company or neglected to make any settlement thereof or claimed said contract was invalid.

For answer to paragraph 10 on page 4, this answering respondent denies each and every allegation contained therein, except that Charles Brown and E. A. Gerety purchased for \$15,000.00 said conditional sales contract, and that on June 7, 1944, and prior thereto demanded of the alleged bankrupt that a payment be made upon said contract and that an arrangement be worked out to pay the balance due thereon in installments, and that said alleged bankrupt agreed, in consideration of an extension of time, to pay the sum of \$7,500.00 and thereafter on November 7, 1944, to pay an additional \$30,000.00. That thereafter said sums were paid as agreed upon and the payment on November 7, 1944, at which time petitioner was given a credit of \$50,000.00 for said payment of \$30,000.00, was after the filing of the purported involuntary petition in bankruptcy. That the unpaid balance upon said contract is the sum of \$80,000.00.

## XI.

For answer to paragraph 11, this answering respondent denies each and every allegation therein contained.

Further answering said paragraph 11, this respondent alleges that petitioner and all of its officers, agents, servants and employees at all times were familiar with the fact that respondent owned a one-third interest in the contract hereinbefore mentioned.

## XII.

For answer to paragraph 12, this answering respondent denies each and every allegation therein contained.

## XIII.

For answer to paragraph 13, this answering respondent denies each and every allegation therein contained. [37]

## XIV.

For answer to paragraph 14, this answering respondent denies each and every allegation therein contained.

## XV.

For answer to paragraph 15, this answering respondent admits the allegations therein contained.

## XVI.

For answer to paragraph 16, this answering respondent denies each and every allegation therein contained.

## XVII.

For answer to paragraph 17, this answering respondent denies each and every allegation therein contained.

Wherefore, this answering respondent prays that this court dismiss the above-entitled proceeding and enter such an order in that connection as is just and proper in the premises.

E. A. GERETY

Respondent

DON M. KITZMILLER

Attorney for Respondent [38]

[Verified.]

[Endorsed]: Filed Jul. 23, 1945 at ..... min. past 10  
A. M. Hugh L. Dickson, Referee; Clerk JB.

[Endorsed]: Filed Sep. 12, 1945. [39]

[Title of District Court and Cause.]

ANSWER OF WILLIAM HARRAH TO PETITION  
FOR ORDER TO SHOW CAUSE

Comes Now William Harrah, and for his answer to the petition for an order to show cause, as filed by Abbott-Kinney Company, a corporation, the alleged bankrupt above named, admits, denies and alleges:

I.

Admits all of the allegations set forth in paragraphs I, II, V, VI, VIII and XV of said petition.

II.

Denies, both generally and specifically, each and every allegation set forth in paragraphs VII, IX, XI, XII, XIII, XIV, XVI, and XVII of said petition.

III.

Admits all of the allegations set forth in paragraph III of said petition, except that as to the contract price of said personal property; and in that connection, denies that the contract price thereof was the sum of Four Hundred Thousand (\$400,000.00) [40] Dollars, and alleges that the contract price thereof was the sum of Two Hundred Fourteen Thousand, Five Hundred (\$214,500.00) Dollars.

IV.

Denies, both generally and specifically, each and every allegation set forth in paragraph IV of said petition.

except that this answering respondent claims that Charles Brown, E. A. Gerety and William Harrah are the owners and holders of the seller's interest in said sprinkling contract, and that each of said parties own an undivided one-third interest therein as their sole and separate property, and not in trust for the alleged bankrupt, or any other person; and said respondent denies that the alleged bankrupt is the owner of said sprinkling contract or sprinkling system, or any part or portion thereof.

## V.

That as to the first paragraph designated as paragraph X in said petition, this respondent denies, both generally and specifically each and every allegation contained therein, except that this answering respondent admits that during the month of May, 1944, there was then due and owing the sum of One Hundred Thirty-seven Thousand (\$137,000.00) Dollars on said sprinkling contract.

## VI.

Answering the second paragraph designated as paragraph X in said petition, this respondent denies, both generally and specifically, each and every allegation contained therein, except that this answering respondent admits that Charles Brown and E. A. Gerety purchased said sprinkling contract from the owner thereof for the sum of Fifteen Thousand (\$15,000.00) Dollars and paid said sum to F. R. Cruickshank Co.; and this answering respondent admits that the above-named alleged bankrupt thereafter paid to said Charles Brown and E. A. Gerety

on account thereof, the sum of Thirty-seven Thousand, Five Hundred (\$37,500.00) Dollars. This [41] answering respondent further alleges that subsequent to said payment, he purchased from said Charles Brown an undivided one-third interest in said contract.

Therefore, this respondent prays that petitioner take nothing by said petition and that it be found and declared that said sprinkling contract is owned by this answering respondent, Charles Brown and E. A. Gerety and that the alleged bankrupt is not the owner thereof.

Dated this 21st day of July, 1945.

WILLIAM HARRAH

By John Harrah

His Agent

Respondent

LESLIE L. HEAP

Attorney for Respondent [42]

[Verified.]

[Endorsed]: Filed Jul. 23, 1945 at ..... min. past 10  
A. M. Hugh L. Dickson, Referee; Clerk JB.

[Endorsed]: Filed Sep. 12, 1945. [43]

[Title of District Court and Cause.]

OBJECTION OF CHARLES BROWN TO JURISDICTION OF THIS COURT IN RE ORDER TO SHOW CAUSE DATED JULY 7, 1945

Now comes respondent Charles Brown and appears specially and objects to the jurisdiction of this court upon the following grounds:

I.

Objects to the jurisdiction of this court and any future proceedings herein on the ground that said amended involuntary petition in bankruptcy does not state facts sufficient to constitute an act of bankruptcy.

II.

That said amended involuntary petition in bankruptcy does not state facts sufficient to give to this court jurisdiction in that no creditors entitled to file an involuntary petition in bankruptcy have signed or joined therein.

III.

That no receiver or trustee has been appointed and the alleged bankrupt cannot invoke the aid of this court to determine a controversy with an adverse claimant. [44]

IV.

That this court does not have possession of the property or of the subject matter of the controversy as set forth in said petition.

V.

That the parties have stipulated and this court has approved said stipulation whereby the controversy between this objecting respondent will be postponed until

the question of whether the above involuntary proceedings will be dismissed or an adjudication entered, all as provided in the stipulation on file herein.

Dated this 23rd day of July, 1945.

COBB & UTLEY

By Francis B. Cobb

Attorneys for Respondent Charles Brown

[Endorsed]: Filed Jul. 23, 1945 at ..... min. past 10 o'clock A. M. Hugh L. Dickson, Referee; Clerk JB.

[Endorsed: Filed Sep. 12, 1945. [45]]

---

[Title of District Court and Cause.]

OBJECTION OF E. A. GERETY TO JURISDICTION OF THIS COURT IN RE ORDER TO SHOW CAUSE DATED JULY 7, 1945

Now comes respondent E. A. Gerety and appears specially and objects to the jurisdiction of this court upon the following grounds:

I.

Objects to the jurisdiction of this court and any future proceedings herein on the ground that said amended involuntary petition in bankruptcy does not state facts sufficient to constitute an act of bankruptcy.

## II.

That said amended involuntary petition in bankruptcy does not state facts sufficient to give to this court jurisdiction in that no creditors entitled to file an involuntary petition in bankruptcy have signed or joined therein.

## III.

That no receiver or trustee has been appointed and the alleged bankrupt cannot invoke the aid of this court to determine a controversy with an adverse claimant. [46]

## IV.

That this court does not have possession of the property or of the subject matter of the controversy as set forth in said petition.

## V.

That the parties have stipulated and this court has approved said stipulation whereby the controversy between this objecting respondent will be postponed until the question of whether the above involuntary proceedings will be dismissed or an adjudication entered, all as provided in the stipulation on file herein.

Dated this 23rd day of July, 1945.

DON M. KITZMILLER

Attorney for Respondent E. A. Gerety [47]

[Verified.]

[Endorsed]: Filed Jul. 23, 1945 at ..... min. past 10 o'clock A. M. Hugh L. Dickson, Referee; Clerk JB.

[Endorsed]: Filed Sep. 12, 1945: [48]

[Title of District Court and Cause.]

PETITION FOR REVIEW OF REFEREE'S  
ORDER

To the Honorable Benno M. Brink, Referee in Bankruptcy:

Come now your petitioners, Charles Brown, E. A. Gerety and William Harrah, and petition for review of your Order of August 23, 1945 and the Findings of Fact and Conclusions of Law made in respect thereto, and respectfully show:

I.

That your petitioners were respondents on a Petition and Order to Show Cause issued by the above entitled court, returnable on the 23rd day of July, 1945, and jointly own a certain conditional sales contract wherein F. R. Cruickshank & Co. was vendor and the alleged bankrupt was purchaser, and in respect to the sum of \$30,000.00 disposed of by the Referee in said Order and Findings dated August 23, 1945.

II.

That attached hereto and marked Exhibit "A" are true copies of the Findings of Fact and Conclusions of Law and said Order of August 23, 1945, hereinafter referred to as "Order". [49]

III.

That said Order, Findings of Fact and Conclusions of Law were and are erroneous in the following respects:

1. That the Referee erred in failing to sustain the objection of your Petitioners to the jurisdiction of the

bankruptcy court to proceed on said Order to Show Cause, said objections being in writing and a true copy of the same is attached hereto and marked Exhibit "B" and made a part hereof by reference.

2. That the Referee erred in finding in paragraph III of said Conclusions of Law that said written objections were not well taken and that the above entitled court had jurisdiction to hear and determine the Order to Show Cause forming the subject matter of this review.

3. That the court erred in finding the facts as set forth in paragraph VI of the Findings of Fact in that there is no evidence to support said Findings of Fact and said Findings of Fact are contrary to the evidence. Said findings complained of are contained in paragraph VI, page 4 of Exhibit "A".

4. That the court erred in finding the facts as set forth in paragraph XII of the Findings of Fact in that there is no evidence to support said Findings of Fact and said Findings of Fact are contrary to the evidence. Said findings complained of are contained in paragraph XII, page 5 of Exhibit "A".

5. That the court erred in finding the facts as set forth in paragraph XIII of the Findings of Fact in that there is no evidence to support said Findings of Fact and said Findings of Fact are contrary to the evidence. Said findings complained of are contained in paragraph XIII, page 6 of Exhibit "A".

6. That the court erred in finding the facts as set forth in paragraphs XIV and XV of the Findings of Fact in that there is no evidence to support said Findings of Fact and said Findings of Fact are contrary to the evi-

dence. Said findings complained of are contained in [50] paragraphs XIV and XV, page 6 of Exhibit "A".

7. That the court erred in finding the facts as set forth in paragraph XVII of the Findings of Fact in that there is no evidence to support said Findings of Fact and said Findings of Fact are contrary to the evidence. Said findings complained of are contained in paragraph XVII, page 6 of Exhibit "A".

8. That the court erred in finding the facts as set forth in paragraph XVIII of the Findings of Fact in that there is no evidence to support said Findings of Fact and said Findings of Fact are contrary to the evidence. Said findings complained of are contained in paragraph XVIII, page 7 of Exhibit "A".

9. That the court erred in finding the facts as set forth in paragraph XIX of the findings of Fact in that there is no evidence to support said Findings of Fact and said Findings of Fact are contrary to the evidence. Said findings complained of are contained in paragraph XIX, page 8 of Exhibit "A".

10. That the court erred in finding the facts as set forth in paragraph XX of the Findings of Fact in that there is no evidence to support said Findings of Fact and said Findings of Fact are contrary to the evidence. Said findings complained of are contained in paragraph XX, page 8 of Exhibit "A".

11. That the court erred in finding the facts as set forth in paragraph XXI of the Findings of Fact insofar as said findings purport to find that the acts as found to have been done therein were done pursuant to or in aid

of a conspiracy or to cheat or defraud the Abbot Kinney Company. Said findings complained of are contained in paragraph XXI, page 8 of Exhibit "A".

12. That the court erred in finding the facts as set forth in paragraph XXII of the Findings of Fact insofar as said findings purport to find that the acts as found to have been done therein were done pursuant to or in aid of a conspiracy or to cheat or defraud the Abbot Kinney Company. Said findings complained of are contained in [51] paragraph XXII, page 9 of Exhibit "A".

13. That the court erred in finding the facts as set forth in paragraphs XXIII and XXIV of the Findings of Fact in that there is no evidence to support said Findings of Fact and said Findings of Fact are contrary to the evidence. Said findings complained of are contained in paragraphs XXIII and XXIV, page 9 of Exhibit "A".

14. That the court erred in finding the facts as set forth in paragraph XXV of the Findings of Fact in that there is no evidence to support said Findings of Fact and said Findings of Fact are contrary to the evidence. Said findings complained of are contained in paragraph XXV, page 10 of Exhibit "A".

15. That the court erred in finding the facts as set forth in paragraph XXVI of the Findings of Fact in that there is no evidence to support said Findings of Fact and said Findings of Fact are contrary to the evidence. Said findings complained of are contained in paragraph XXVI, page 10 of Exhibit "A".

16. That the court erred in finding the facts as set forth in paragraph XXVIII of the Findings of Fact in that there is no evidence to support said Findings of Fact

and said Findings of Fact are contrary to the evidence. Said findings complained of are contained in paragraph XXVIII, page 10 of Exhibit "A".

17. That the court erred in finding the facts as set forth in paragraph XXIX of the Findings of Fact in that there is no evidence to support said Findings of Fact and said Findings of Fact are contrary to the evidence. Said findings complained of are contained in paragraph XXIX, page 11 of Exhibit "A".

18. That the court erred in finding the facts as set forth in paragraph XXX of the Findings of Fact in that there is no evidence to support said Findings of Fact and said Findings of Fact are contrary to the evidence. Said findings complained of are contained in paragraph XXX, page 11 of Exhibit "A".

19. That the court erred in finding the facts as set forth [52] in paragraph XXXI of the Findings of Fact in that there is no evidence to support said Findings of Fact and said Findings of Fact are contrary to the evidence. Said findings complained of are contained in paragraph XXXI, page 11 of Exhibit "A".

20. That the court erred in finding the facts as set forth in paragraph XXXII of the Findings of Fact in that there is no evidence to support said Findings of Fact and said Findings of Fact are contrary to the evidence. Said findings complained of are contained in paragraph XXII, page 11 of Exhibit "A".

21. That the court erred in failing to find the date of the alleged conspiracy.

22. That the court erred in admitting over the objection of Charles Brown hearsay testimony, and later

erred in failing to strike said testimony, the objection, ruling and motion being as follows:

Transcript page 127, line 5 to page 128, line 21.

"Q. What have you told in Directors' meetings regarding its value?

Mr. Cobb: I object on the ground that it is *hearsay* and inadmissible as far as Mr. Brown is concerned.

Mr. Davis: Mr. Brown is a party.

Mr. Cobb: Mr. John Harrah has quitclaimed any claims he has, and it would not be admissible against Mr. Brown or Mr. Gerety that this man might have declared or had an opinion at one time as to the validity or invalidity of the contract. And if the other parties were not there, it would be hearsay.

Mr. Davis: If your Honor please, Mr. John Harrah is a party to this. The fact that he disclaims an interest does not mean that he has been relieved of any—

The Referee: I don't think so, Mr. Cobb. The evidence shows that Mr. Brown sold half of his interest in [53] this contract to Mr. Harrah's son for \$3,000, and a part at least of the negotiations for that transfer was handled by Mr. John Harrah. No, the objection is overruled. But try to make your questions as specific as you can, Mr. Davis.

Mr. Cobb: May I say this, your Honor: I will not object to anything that occurred after that date; but I do object to going back since 1937, before there was any such relationship. Counsel charges conspiracy. I think he ought to state when the con-

spiracy was entered into so that we could have some date that we could tie our objections to, not go back to—

The Referee: It is not merely a question of conspiracy. If it be shown that any one in a fiduciary relationship to this corporation purchased a claim against the corporation, then that person may be allowed only what he paid for that claim.

Mr. Cobb: I am not arguing that question; but he is calling for something that occurred in a Directors' meeting when Mr. Davis and Mr. Harrah were talking about this contract, when none of the respondents was present.

The Referee: That doesn't make a bit of difference. It is all a part of the general question. If it be shown that the witness John Harrah took one attitude toward this contract while it was in the hands of the Cruickshank Company and took another attitude when it was in the hands of Charles Brown, who concedes that he held it in trust partially for the general manager of the company, that may be a very important circumstance. The objection is overruled. Go ahead, Mr. Davis. Make your questions as specific as you can." [54]

---

Transcript page 138, line 2 to page 139, line 17.

"Mr. Davis: Q. Did you, Mr. Harrah, express a consistent position as to the payment on account of the F. R. Cruickshank Company in the meetings of the Board of Directors?

Mr. Cobb: We object on the ground that it is ambiguous as to "consistent", and that—

The Referee: "Consistent" means did he continuously advocate the same course of treatment or the same position, or did he at some time or other change his position. The objection is overruled.

The Witness: Yes, I maintained a consistent position.

Mr. Davis: Q. Now what was that position which you maintained?

Mr. Cobb: We object on the ground that it calls for the conclusion of the witness and that no proper foundation has been laid.

The Referee: Well, we will interpret the question to mean the substance of what he said. The objection is overruled.

Mr. Cobb: And when, your Honor? I mean, that is important.

The Referee: The time is whenever the matter came up for discussion at the Directors' meetings at which Mr. John Harrah was present.

Mr. Cobb: I object to any time before there is any charge that Mr. Brown had anything to do with this contract.

The Referee: The objection is overruled. Proceed.

The Witness: Well, there was—that sprinkler contract was not mentioned in many Directors' meetings. In fact, your records will show that there weren't many Directors' meetings. There were very few over the period of [55] the last four years, I would say.

Mr. Davis: Q. Between 1937 and 1941—we will limit our time to those years to start with now—

A. I don't know how many Directors' meetings there were. There weren't many then.

Mr. Cobb: I want to interpose an objection to that period of time. It is too remote. It has no bearing on the issues of this case, what he might have thought in 1941 or 1944, when they charge that this was acquired under a conspiracy. It is too remote to have any bearing on the issues here.

The Referee: Overruled. Go on."

23. That the court erred in not admitting evidence and as to the obligations of the Abbot Kinney Company at the time of the payment of the \$7,500.00 to Charles E. Brown, and in respect to the bond issue being an obligation of the company, for the reason that the same was outlawed by the Statute of Limitations. The exclusion of the evidence and the offer of proof as set forth in transcript page 209, line 25 to page 213, line 17, is as follows:

"Q. Mr. Harrah, at the time of the payment of this \$7500 in June, 1944, were there any large creditors of the Abbot Kinney Company except—

A. The only large creditors are current creditors. They paid all creditors on the 10th of the month.

Mr. Davis: Your Honor, I object to the question on the ground that it is incompetent, irrelevant, and immaterial so far as this particular proceeding is concerned. I think it goes to the question of the precise—that that is not involved in this particular phase of the investigation.

The Referee: How will it help you, counsel?

Mr. Kitzmiller: Merely this, that counsel—and [56] this is merely cross examination—went into the question of the moneys on hand in June and November and the payment of \$30,000 at one time, \$7500 at another time; and I would like to know whether or not there was any outstanding obligation at those particular times other than this matter of the insurance company—not the insurance company, this personal injury judgment—that would show that there were no funds with which this \$30,000 could be paid or the \$30,000 was taken from some other legitimate expense and turned over to these people without this money, all of it, being in the company treasury, being really necessary for allocation to other purposes.

The Referee: Objection sustained. Proceed.

Mr. Cobb: Your Honor, on that I think we should make an offer of proof, that there were no other creditors—the \$15,000 that was mentioned as a judgment was later paid by the insurance carrier. And there were no obligations other than current bills and that condition extended down to the payment of the \$30,000 in November.

Mr. Davis: We object to the offer of proof.

The Referee: You owed \$320,000 on the bond issue, did you not?

Mr. Davis: Substantially that and over \$100,000 in taxes.

The Referee: I think the whole thing is immaterial to this hearing. It will be material if we get

to the hearing on the involuntary petition. But it is immaterial to the issues here.

Mr. Cobb: So far as the bond issue is concerned we can go into that—

The Referee: You see where we are going to lead to if we go into the question of the solvency or insolvency [57] of this company in this hearing, or the present liabilities of the company. We are just going to extend this into the involuntary petition, and these matters have not been consolidated for hearing. It is entirely immaterial what the financial condition of the company was. It is material, I think, to know the cash resources of the company at the various times that are of importance here; but what the liabilities of the company were, that is immaterial.

Mr. Cobb: I want the record to be clear on my position. My position is this—

The Referee: You may make an offer of proof, Mr. Cobb.

Mr. Cobb: The offer of proof will be that the bond issue which your Honor has mentioned was outlawed by the statute of limitations so far as any liability against the assets of this corporation; that there were no merchandise creditors or creditors other than for current obligations that had an enforceable claim against the assets of the corporation; that the taxes due were real estate taxes against the particular parcels of real property; that the obligation under the sprinkler contract and the obligation to the trustee on the bond indenture constituted the obligations of the company.

The Referee: Is there an objection?

Mr. Davis: Oh, yes, we object to it, your Honor, on the ground that it is incompetent, irrelevant, and immaterial, and has no bearing on the issues presented in this particular proceeding.

The Referee: The objection is sustained.

Mr. Heap: Let the record show the same objection on behalf of William Harrah, your Honor.

Mr. Kitzmiller: The same objection on behalf of Mr. Gerety with an additional offer to the effect that the [58] assets—an offer to prove that the assets of the company were in no event, under any consideration, irrespective of any of the liabilities, equal to or capable of—or equal to the amount of the bond issue outstanding, irrespective of any question of interest on the bond issue; also a further offer that, as to these taxes spoken of, we would prove by this witness that these taxes were not taxes on any of the operative property—

The Referee: Make your offer of proof, counsel. If you don't know what it is, don't ask some other attorney. Go ahead. Have you finished?

Mr. Kitzmiller: Yes.

The Referee: Is there any objection?

Mr. Davis: We object on the same grounds.

The Referee: Objection sustained. Is there any objection to the offer of proof on behalf of William Harrah?

Mr. Davis: We make the same objection, your Honor, to all offers of proof, as I said.

Mr. Cobb: I am not clear whether I made any offer from the period of June 23, I believe the date

of the \$7500 payment, to the payment of the \$30,000 on November 8th. I want to be sure that those two periods and dates are covered in my offer."

24. That the court erred in permitting hearsay testimony in respect to a conversation between Louis Halper and John Harrah over the objection of petitioners in refusing thereafter to strike said testimony.

Transcript 364, lines 18 to 22 inclusive:

"Q. What was said in those meetings in relation to the Abbot Kinney Company, Cruickshank Company contract?

Mr. Cobb: To which we object on the ground that it is hearsay as far as respondent Brown is concerned. [59]

The Referee: Overruled."

Transcript 420, line 21 to 422, line 2:

"Mr. Davis: Mr. Newton may be excused. I think that is our case, your Honor.

The Referee: Who wants to go forward?

Mr. Cobb: As this time I will move to strike the testimony given by Mr. Halper in respect to a conference between Mr. Williams and Mr. John Harrah, where Mr. Brown was not present and there is no—the only possible ground on which that could be admissible or binding would be on the ground that there was a conspiracy; and the petitioner having closed his case and no conspiracy having been established, I submit it is hearsay and—

The Referee: Why do you say no conspiracy has been established?

Mr. Cobb: Because there has been no evidence at all that there was any conspiracy between Mr. Harrah; and the evidence is undisputed that Mr. Harrah did not know that Mr. Gerety and Mr. Brown were going to negotiate for this contract until after it was already purchased. The evidence is undisputed that he told Mr. Brown that in his opinion he should not buy it because he would have a lot of trouble, like that the Cruickshank people had, in trying to collect, and that a deficiency was not good if the bonds were foreclosed; that it would probably cause a bond foreclosure if somebody bought the contract; and that there is not one word of evidence showing any joint plan, scheme, or design on behalf of Mr. Harrah with Mr. Gerety and Mr. Brown in acquiring this contract.

The Referee: The motion is denied.

Mr. Kitzmiller: I make the same motion in so far as Mr. Gerety is concerned, your Honor. [60]

The Referee: The motion is denied.

Mr. Vernon: I would like also to make the same motion in regard to my client, William Harrah.

The Referee: The motion is denied."

25. The court erred in finding as a fact and drawing conclusions of law and order in finding that there was any conspiracy between your petitioners or any of them, and further erred in finding that your petitioners or any of them owed to the corporation a fiduciary relationship in respect to the purchase and acquisition of

the F. R. Cruickshank & Co.'s conditional sales contract where said corporation had been given the opportunity to purchase the same and had declined so to do.

26. That the court erred in creating constructive trust in respect to said conditional sales contract with F. R. Cruickshank & Co. and in respect to the moneys paid by the corporation to petitioners Charles Brown and E. A. Gerety.

#### IV.

That the Conclusions of Law are erroneous and Charles Brown, E. A. Gerety and William Harrah except to said Conclusions of Law in respect to the recitals contained in paragraphs I, II, III, IV and V thereof.

#### V.

That said Order of August 23, 1945 is erroneous and contrary to the facts, evidence and law wherein it is ordered:

1. That Abbot Kinney Company, the alleged bankrupt, is the owner of that certain sprinkling system installed by F. R. Cruickshank & Co. under a conditional sales contract, free and clear of said conditional sales contract.

2. That neither E. A. Gerety, Charles Brown nor William Harrah has any right to collect any money on account of said conditional sales contract or to exercise any rights or to enforce any obligations thereunder as against Abbot Kinney Company. [61]

3. Wherein it was ordered that the Clerk of this Court turn over and deliver to Abbot Kinney Company the sum of \$22,500.00 now on deposit with said Clerk.

Wherefore your petitioners, feeling aggrieved because of such Order and Findings of Fact and Conclusions of Law made in connection therewith, pray that the same be reviewed as provided in Section 39c of the National Bankruptcy Act, and that said Order be reversed, set aside and annulled.

That your petitioners recover their costs and be granted such other relief and orders as may be proper in the premises.

That the Referee compare his certificate and attach thereto the reporter's transcript and the originals of all exhibits offered and received in connection with said proceeding, and the originals of the following documents: Amended Involuntary Petition and Answer thereto, Amended Answer to the Amended Involuntary Petition, the original Petition and Order to Show Cause on which the order sought to be reviewed was based, the Objection of Charles Brown to Jurisdiction of this Court in re Order to Show Cause dated July 7, 1945, the Answer of Charles Brown to Petition and Order to Show Cause dated July 7, 1945, Petition in Intervention in Opposition to Amended Involuntary Petition, and Notice of Motion on Petition to Intervene.

CHARLES BROWN  
E. A. GERETY and  
WILLIAM HARRAH

By Charles Brown

COBB & UTLEY  
D. M. KITZMILLER and  
LESLIE L. HEAP

Attorneys for Petitioners

By Francis B. Cobb [62]

## EXHIBIT "A"

In the District Court of the United States  
Southern District of California  
Central Division

In Bankruptcy No. 43,551 O'C.

In the Matter of ABBOT KINNEY COMPANY, a  
corporation, Alleged Bankrupt.

FINDINGS OF FACT AND CONCLUSIONS  
OF LAW

The hearing on the Order to Show Cause why that certain sprinkling system installed by F. R. Cruickshank & Company on the property of Abbot Kinney Company, the alleged bankrupt, at Venice, Los Angeles, California, should not be determined to be owned by said Abbot Kinney Company, the alleged bankrupt, free and clear of any and all liens, liabilities or claims and why the sum of \$30,000 deposited with the Clerk of this court should not be returned to Abbot Kinney Company, the alleged bankrupt, directed to Charles Brown, E. A. Gerety, William Harrah and John Harrah, came on regularly for hearing on the 23rd day of July, 1945, at the hour of 10 o'clock A. M. before the Honorable Hugh L. Dickson, Referee presiding, in Room 343, Federal Building, Los Angeles, California, Messrs. Grainger & Hunt by Kyle Z. Grainger, Esq., and Messrs. Nicholas & Davis by M. Phillip Davis, Esq., appearing for the alleged bankrupt; Francis B. Cobb, Esq., appearing for respondent Charles Brown; D. M. Kitzmiller, Esq., appearing for respondent E. A. Gerety; Leslie L. Heap, Esq., appearing for the respondent William Harrah; and respondent John Harrah

appearing in [63] propria persona; and written objections by respondents Charles Brown and E. A. Gerety to the jurisdiction of this Court having been filed, which objections were orally adopted by the respondent William Harrah, and the matter having been considered and the Referee having determined that the objections to the jurisdiction of the Court were not well taken and that the Referee had jurisdiction to hear said Order to Show Cause, and D. M. Kitzmiller, Esq., on behalf of respondent E. A. Gerety, having objected to the said Referee, Hugh L. Dickson, continuing with the hearing on said Order to Show Cause, on the ground that said Referee Hugh L. Dickson had indicated prejudice against certain of the respondents and the Hon. Hugh L. Dickson having determined that he was not prejudiced against any of said respondents but rather than try said Order to Show Cause in the face of such objections, that the same should be transferred to the Hon. Benno M. Brink, as Referee in Bankruptcy, to which assignment said respondents, and each of them, consented in open court, and said Order to Show Cause having then been assigned for hearing before the said Hon. Benno M. Brink, as Referee in Bankruptcy by an order duly given and made by said Referee Hugh L. Dickson, pursuant to and in the manner provided by the Rules of Court, and an order of General reference of the entire bankruptcy proceedings in the above entitled matter to the Hon. Benno M. Brink, as Referee in Bankruptcy, having thereafter been duly given and made, and the Hon. Benno M. Brink having accepted such assignment and said general reference as Referee in Bankruptcy, and the objection to the jurisdiction of the court having been renewed by respondents Charles Brown, E. A. Gerety and William Harrah before

the Hon. Benno M. Brink, as Referee in Bankruptcy, on the same grounds as those theretofore urged before the Hon. Hugh L. Dickson, Referee, and said Hon. Benno M. Brink, as Referee, having sustained the ruling theretofore given by the Hon. Hugh L. Dickson, Referee, that the court did have jurisdiction to hear and determine said Order to Show Cause; and evidence, both oral and documentary, having been introduced and the matter having been heard before said Hon. Benno M. Brink, Referee presiding, on the 24th, 25th, 26th and 27th day of July, 1945, the Referee now makes his Findings of Fact and Conclusions of Law as follows:

## I.

It is true that on the 21st day of October, 1944, a Petition in Involuntary Bankruptcy was filed in the District Court of the United States, Southern District of California, Central Division, against Abbot Kinney Company, a California corporation.

It is true that thereafter and on the 28th day of February, 1945, a First Amended Involuntary Petition in Bankruptcy was filed in said proceedings.

It is true that an Answer and a First Amended Answer to said First Amended Involuntary Petition were filed and the matter is now pending before the above entitled court.

## II.

It is true that no Receiver has been appointed in this proceeding.

## III.

It is true that the objection of Respondents E. A. Gerety, William Harrah, John Harrah and Charles Brown to the jurisdiction of this court, is not well taken.

It is true that this court has jurisdiction to hear and determine the Order to Show Cause above referred to.

## IV.

It is true that John Harrah was at all times since the 23rd day of December, 1937, and now is a member of the Board of Directors of the alleged Bankrupt, Abbot Kinney Company.

## V.

It is true that on the 6th day of April, 1938, an Executive Committee was created by action of the Board of Directors of Abbot Kinney Company, the alleged bankrupt, and given authority to carry on [65] the business of said Abbot Kinney Company during the intervals between the meetings of its Board of Directors.

It is true that at all times from and after the 2nd day of January, 1940, to and including the 13th day of November, 1944, said Executive Committee of Abbot Kinney Company was composed of the following persons: John Harrah, Carleton Kinney and Alfred A. Newton.

## VI.

It is true that Carleton Kinney was at all times herein mentioned, under the domination and control of John Harrah and voted at the meetings of the Executive Committee of Abbot Kinney Company as and in the manner directed by said John Harrah.

## VII.

It is true that on the 2nd day of June, 1931, F. R. Cruickshank & Company entered into a conditional sales contract in writing with Abbot Kinney Company, the alleged bankrupt, to install on the property of Abbot Kinney Company at Venice, Los Angeles, California, a sprinkling system, at and for a purchase price of approximately \$214,000.00, of which sum \$137,000. remained unpaid until the payments to Charles Brown, hereinafter mentioned, were made.

It is true that pursuant to said conditional sales contract, said sprinkling system was installed by said F. R. Cruickshank & Company on the properties of said alleged bankrupt at Venice, Los Angeles, California.

## VIII.

It is true that prior to and at the time of the filing of the above mentioned involuntary petition in bankruptcy and continuously since then, Abbot Kinney Company, the alleged bankrupt, has been and now is in possession of said sprinkling system.

## IX.

It is true that E. A. Gerety was at all times during the transactions herein mentioned, the General Manager of Abbot Kinney Company and was its chief executive officer in charge of its business, [66] subject to the orders and directions of the executive committee.

## X.

It is true that William Harrah and Charles Brown, and each of them, at all times from and after January 2, 1940, knew that John Harrah was a member of the Executive Committee and a member of the Board of

Directors of Abbot Kinney Company, and that E. A. Gerety was its General Manager and chief executive officer in charge of its business.

## XI.

It is true that at all times herein mentioned, Charles Brown was a close intimate friend and business associate of John Harrah and William Harrah.

## XII.

It is true that some time prior to the 13th day of June, 1944, and subsequent to the 2nd day of January, 1940, at the instance and instigation of John Harrah, an unconscionable conspiracy was knowingly, willfully and fraudulently entered into between John Harrah, William Harrah, Charles Brown and E. A. Gerety, to defraud and cheat the Abbot Kinney Company out of a substantial portion of its assets by having the Executive Committee of Abbot Kinney Company refuse to purchase the above mentioned conditional sales contract on the sprinkling system from F. R. Cruickshank & Company for and on behalf of the Abbot Kinney Company, but on the contrary, to have the respondent, Charles Brown, purchase said conditional sales contract in his own name for and on behalf of and as undisclosed agent for said conspirators and for their personal benefit at as low a figure as he could negotiate and to thereafter demand from Abbot Kinney Company its payment, and to have said Executive Committee, at the instance and request and through the influence of John Harrah, authorize and order the payment to Charles Brown, of said conditional sales contract, as rapidly as money of Abbot Kinney Company was available. [67]

## XIII.

It is true that John Harrah, William Harrah, Charles Brown and E. A. Gerety at all times herein mentioned knew that said conditional sales contract was junior to an outstanding bonded indebtedness of the alleged bankrupt in the principal sum of \$269,000.00, with unpaid interest at 7% since 1932, and junior to the lien of outstanding real estate taxes in excess of \$75,000. and that said conditional sales contract had little or no value in the possession of a person not in control of spending the money of Abbot Kinney Company.

## XIV.

It is true that in furtherance of said conspiracy to defraud and cheat Abbot Kinney Company, the alleged bankrupt, and as a part thereof, John Harrah and Carleton Kinney, as members of said Executive Committee of Abbot Kinney Company, knowingly, fraudulently and willfully refused to accept an offer made by F. R. Cruickshank & Company on or about June 6th, 1944, to sell said sprinkling system contract for \$10,000.00.

## XV.

It is true that thereafter and in furtherance of said conspiracy to defraud and cheat Abbot Kinney Company, and as a part thereof, on June 13th, 1944, Charles Brown obtained an assignment in writing, in his own name, of said conditional sales contract from F. R. Cruickshank & Company, for which assignment F. R. Cruickshank & Company received \$15,000.00.

## XVI.

It is true that at all times herein mentioned, E. A. Gerety and John Harrah had full and complete access

to the books and accounts of Abbot Kinney Company and knew the cash position of Abbot Kinney Company.

### XVII.

It is true that after the 13th day of June and prior to the 20th day of June, and in violation of their respective fiduciary [68] obligations to the Abbot Kinney Company and in furtherance of said conspiracy to defraud and cheat Abbot Kinney Company, and as part thereof, E. A. Gerety and John Harrah told Charles Brown that the Abbot Kinney Company had \$7,500.00 which could and would be paid on account of said conditional sales contract, if demand therefor was made.

### XVIII.

It is true that thereafter and on the 20th day of June, 1944, and as a part of said conspiracy to defraud and cheat Abbot Kinney Company, the alleged bankrupt, and in furtherance thereof, said Charles Brown appeared before the Executive Committee of Abbot Kinney Company, at which time John Harrah and Carleton Kinney were present, and demanded that \$7,500.00 be paid on account of said conditional sales contract.

It is true that at the time said demand for payment of \$7,500.00 was made by said Charles Brown, no money had been paid on said conditional sales contract since the year 1932, all of which both Carleton Kinney and John Harrah well knew.

It is true that John Harrah had, on many occasions prior to the 20th day of July, 1944, and during the period he was on said Executive Committee of Abbot Kinney Company and a member of the Board of Directors thereof, stated that said conditional sales contract was of no

value and that he would not consent to the payment of any moneys on account thereof so long as the bonded indebtedness of Abbot Kinney Company, the alleged bankrupt, remained unpaid.

It is true that at the time said Charles Brown appeared before said Executive Committee on said 20th day of June, 1944, as aforesaid, John Harrah, in furtherance of said conspiracy to defraud and cheat Abbot Kinney Company, the alleged bankrupt, and as a part thereof, told Carleton Kinney that \$7,500.00 should be paid on account of said conditional sales contract, and instructed said Carleton Kinney to vote such payment. [69]

It is true that said Carleton Kinney and said John Harrah did then and there vote to pay \$7,500. of the cash of Abbot Kinney Company to Charles Brown for and on account of said conditional sales contract.

## XIX.

It is true that thereafter and in furtherance of said conspiracy to cheat and defraud Abbot Kinney Company, the alleged bankrupt, and as a part thereof, said Carleton Kinney and John Harrah signed a check of Abbot Kinney Company in the sum of \$7,500, made payable to said Charles Brown, and had the same delivered to said Charles Brown, which check was thereafter cashed and the money obtained thereon by said Charles Brown.

## XX.

It is true that prior to the 7th day of November, 1944, and in violation of their respective fiduciary obligations to the Abbot Kinney Company and in furtherance of said conspiracy, and as a part thereof, E. A. Gerety and John Harrah told Charles Brown that the Abbot Kinney Com-

pany had \$30,000. which could and would be paid on account of said conditional sales contract, if demand therefor was made.

## XXI.

It is true that thereafter and pursuant to said conspiracy to cheat and defraud Abbot Kinney Company, the alleged bankrupt, and as a part thereof, and on the 7th day of November, 1944, and after the above mentioned involuntary petition in bankruptcy had been filed against said Abbot Kinney Company, that the said John Harrah and Carleton Kinney again held a meeting of the Executive Committee, at which time said Charles Brown appeared and made a demand for the payment of an additional \$30,000. on account of said conditional sales contract and stated that if the same were not paid, the water would be turned off from said sprinkling system.

It is true that in furtherance of said conspiracy to cheat [70] and defraud Abbot Kinney Company, the alleged bankrupt, and as a part thereof, said John Harrah told Carleton Kinney that \$30,000. should be paid on account of said contract, and instructed Carleton Kinney to vote such payment.

It is true that John Harrah and Carleton Kinney did then vote to pay said sum of \$30,000. to Charles Brown for and on account of said conditional sales contract.

## XXII.

It is true that thereafter and in furtherance of said conspiracy to cheat and defraud Abbot Kinney Company, the alleged bankrupt, and as a part thereof, said Carleton Kinney and John Harrah signed a check of Abbot Kinney Company in the sum of \$30,000. made payable to said

Charles Brown, and had the same delivered to said Charles Brown, which check was thereafter cashed and the money obtained thereon, by said Charles Brown.

### XXIII.

It is true that at all times herein mentioned and during the above mentioned transactions, John Harrah and E. A. Gerety held fiduciary positions with Abbot Kinney Company and were not free to act in a manner contrary or antagonistic to the best interests of Abbot Kinney Company.

### XXIV.

It is true that Abbot Kinney Company was financially able to purchase said conditional sales contract from F. R. Cruickshank & Company at and for the price of \$10,000. at the time it was offered to it, on or about June 6, 1944, and that said Abbot Kinney Company would have purchased the same at such price if it had not been prevented from doing so by the above mentioned conspiracy instigated, conceived and executed by John Harrah with the help, assistance and connivance of William Harrah, E. A. Gerety and Charles Brown, as aforesaid.

It is true that it would have been for the best interests of Abbot Kinney Company, the alleged bankrupt, to have purchased said [71] conditional sales contract for \$10,000. at the time the same was offered to it on June 6, 1944.

### XXV.

It is true that the written assignment of said conditional sales contract was taken from F. R. Cruickshank & Company in the name of Charles Brown for the benefit of E. A. Gerety, John Harrah, William Harrah and Charles Brown and as a part of and in furtherance of

said conspiracy to cheat and defraud Abbot Kinney Company, the alleged bankrupt, and for the purpose of misleading Abbot Kinney Company and its directors and officers other than John Harrah, of the interests therein held by John Harrah, William Harrah and E. A. Gerety.

## XXVI.

It is true that all of said acts of said E. A. Gerety and John Harrah, as above set forth, in connection with the acquisition of and payment on account of said conditional sales contract, were in violation of the fiduciary obligations and duties owing by said E. A. Gerety and John Harrah to said Abbot Kinney Company, of which Charles Brown and William Harrah well knew.

It is true that all of said acts were done for the purpose of and with the intent of defrauding and cheating said Abbot Kinney Company and its creditors and estate, and for the benefit of said Charles Brown, E. A. Gerety, William Harrah and John Harrah and contrary to the best interests of said Abbot Kinney Company.

## XXVII.

It is true that the sum of \$30,000. above referred to, was deposited with the Clerk of the above entitled Court as a court of bankruptcy, pursuant to an amended stipulation and order approving same on file in this matter, and that said sum is now under the control and direction, and subject to the order of this court in this proceeding.

## XXVIII.

It is true that on the 30th day of November, 1944, William [72] Harrah advised the alleged bankrupt, Abbot Kinney Company, in writing, that he had purchased a one-

third interest in the unpaid balance due on said conditional sales contract, on the 25th day of November, 1944.

It is true that said notice was sent to Abbot Kinney Company in furtherance of and as a part of said conspiracy to cheat and defraud Abbot Kinney Company, the alleged bankrupt, and was given for the purpose of misleading the alleged bankrupt as to the date on which said William Harrah obtained his interest in said conditional sales contract.

### XXIX.

It is true that none of the respondents herein were qualified under the Bankruptcy Act on behalf of Abbot Kinney Company, the alleged bankrupt, or at all, to defend against the involuntary petition in bankruptcy filed herein, or to raise any issues regarding the sufficiency of the original or amended involuntary petition in bankruptcy filed herein.

### XXX.

It is true that Abbott Kinney Company, the alleged bankrupt, owns the sprinkling system installed by F. R. Cruickshank & Company, free and clear of said conditional sales contract.

### XXXI.

It is true that neither E. A. Gerety, Charles Brown, John Harrah nor William Harrah has any rights to collect any money on account of said conditional sales contract from Abbot Kinney Company, the alleged bankrupt, or to exercise any rights or enforce any obligations thereunder as against Abbot Kinney Company, the alleged bankrupt.

## XXXII.

It is true that Abbot Kinney Company, the alleged bankrupt, is entitled to receive \$22,500. of said money now on deposit with the Clerk of the above entitled Court, as a court of bankruptcy, and said Charles Brown and E. A. Gerety are entitled to receive the remaining \$7500. thereof. [73]

## XXXIII.

Except as otherwise hereinabove specifically found, all of the allegations of the Petition for Order to Show Cause are true and none of the allegations of the respective Objections to Jurisdiction or of the Answers to the Petition for Order to Show Cause of the Respondents, filed herein, are true.

## CONCLUSIONS OF LAW

From the foregoing facts, the Referee makes the following Conclusions of Law:

## I.

That neither E. A. Gerety, William Harrah, Charles Brown nor John Harrah were qualified under the Bankruptcy Act, on behalf of Abbot Kinney Company, the alleged bankrupt, or at all, to defend against the Involuntary Petition in Bankruptcy filed herein, or to raise any issue regarding the sufficiency of the original or amended Involuntary Petition in Bankruptcy filed herein.

## II.

That this Court has jurisdiction to hear and determine all of the issues raised by the Order to Show Cause above referred to and the answers of respondents filed thereto.

## III.

That the sprinkling system installed by F. R. Cruickshank & Company on the property of Abbot Kinney Company, the alleged bankrupt, at Venice, Los Angeles, California, pursuant to that certain conditional sales contract entered into by and between F. R. Cruickshank & Company and Abbot Kinney Company on or about June 2, 1931, is owned by Abbot Kinney Company free and clear of said conditional sales contract.

## IV.

That neither E. A. Gerety, Charles Brown, John Harrah nor William Harrah has any right to collect any money on account of said [74] conditional sales contract, or to exercise any rights or enforce any obligations thereunder, as against Abbot Kinney Company, the alleged bankrupt.

## V.

That Abbot Kinney Company, the alleged bankrupt, is entitled to receive \$22,500.00 of said money now on deposit with the Clerk of the above entitled court, as a court of bankruptcy.

## VI.

That Charles Brown is entitled to receive \$7500.00 of said money now on deposit with the Clerk of the above entitled court, as a court of bankruptcy.

Let the Order Be Entered Accordingly.

Dated: August 23, 1945.

BENNO M. BRINK

Referee [75]

## EXHIBIT "A"

In the District Court of the United States  
Southern District of California  
Central Division

In Bankruptcy No. 43,551 O'C.

In the Matter of ABBOT KINNEY COMPANY, a  
corporation, Alleged Bankrupt.

ORDER DIRECTING CLERK OF THE COURT TO  
PAY MONIES ON DEPOSIT TO ABBOT  
KINNEY COMPANY, ET AL., AND DETER-  
MINING TITLE TO SPRINKLING SYSTEM

At Los Angeles, in said District, on the 23rd day of August, 1945, before the Honorable Benno M. Brink, Referee presiding:

The hearing on the Order to Show Cause why that certain sprinkling system installed by F. R. Cruickshank & Company on the property of Abbot Kinney Company, the alleged bankrupt, at Venice, Los Angeles, California, should not be determined to be owned by said Abbot Kinney Company, the alleged bankrupt, free and clear of any and all liens, liabilities or claims and why the sum of \$30,000 deposited with the Clerk of this court should not be returned to Abbot Kinney Company, the alleged bankrupt, directed to Charles Brown, E. A. Gerety, William Harrah and John Harrah, came on regularly for hearing on the 23rd day of July, 1945, at the hour of 10 o'clock A. M. before the Honorable Hugh L. Dickson, Referee presiding, in [76] Room 343, Federal Building, Los Angeles, California, Messrs. Grainger & Hunt by Kyle Z. Grainger, Esq., and Messrs. Nicholas & Davis by

M. Philip Davis, Esq., appearing for the alleged bankrupt; Francis B. Cobb, Esq., appearing for respondent Charles Brown; D. M. Kitzmiller, Esq., appearing for respondent E. A. Gerety; Leslie L. Heap, Esq., appearing for the respondent William Harrah; and respondent John Harrah appearing in propria persona; and written objections by respondents Charles Brown and E. A. Gerety to the jurisdiction of this Court having been filed, which objections were orally adopted by the respondent William Harrah, and the matter having been considered and the Referee having determined that the objections to the jurisdiction of the Court were not well taken and that the Referee had jurisdiction to hear said Order to Show Cause, and D. M. Kitzmiller, Esq., on behalf of respondent E. A. Gerety, having objected to the said Referee, Hugh L. Dickson, continuing with the hearing on said Order to Show Cause, on the ground that said Referee Hugh L. Dickson had indicated prejudice against certain of the respondents and the Hon. Hugh L. Dickson having determined that he was not prejudiced against any of said respondents but rather than try said Order to Show Cause in the face of such objections, that the same should be transferred to the Hon. Benno M. Brink, as Referee in Bankruptcy, to which assignment said respondents, and each of them, consented in open court, and said Order to Show Cause having been assigned for hearing before the said Hon. Benno M. Brink, as Referee in Bankruptcy by an order duly given and made by said Referee Hugh L. Dickson, pursuant to and in the manner provided by the Rules of Court, and an order of general reference of the entire bankruptcy proceedings in the above entitled matter to the Hon. Benno M.

Brink, as Referee in Bankruptcy, having thereafter been duly given and made, and the Hon. Benno M. Brink having accepted such assignment and said general reference as Referee in Bankruptcy, and the objection to the jurisdiction of the [77] court having been renewed by respondents Charles Brown, E. A. Gerety and William Harrah before the Hon. Benno M. Brink, as Referee in Bankruptcy, on the same grounds as those theretofore urged before the Hon. Hugh L. Dickson, Referee, and said Hon. Benno M. Brink, as Referee, having sustained the ruling theretofore given by the Hon. Hugh L. Dickson, Referee, that the court did have jurisdiction to hear and determine said Order to Show Cause; and evidence, both oral and documentary, having been introduced and the matter having been heard before said Hon Benno M. Brink, Referee presiding, on the 24th, 25th, 26th and 27th day of July, 1945, and the Referee having made and filed herein, his Findings of Fact and Conclusions of Law:

It Is Ordered that Abbot Kinney Company, the alleged bankrupt, is the owner of that certain sprinkling system installed by F. R. Cruickshank & Company on the property of Abbot Kinney Company, the alleged bankrupt, at Venice, Los Angeles, California, pursuant to that certain conditional sales contract entered into by and between F. R. Cruickshank & Company and Abbot Kinney Company on or about June 2, 1931, free and clear of said conditional sales contract; and,

It Is Further Ordered that neither E. A. Gerety, Charles Brown, John Harrah nor William Harrah has any right to collect any money on account of said conditional sales contract or to exercise any rights or to enforce any obligations thereunder as against Abbot Kinney Company, the alleged bankrupt; and,

It Is Further Ordered that the clerk of the above entitled court, as a court of bankruptcy, forthwith turn over and deliver to Abbot Kinney Company, the alleged bankrupt, the sum of \$22,500.00 now on deposit with said clerk; and,

It Is Further Ordered that the clerk of the above entitled court, as a court of bankruptcy, forthwith turn over and deliver to Charles Brown, the sum of \$7500.00; and, [78]

It Is Further Ordered that neither E. A. Gerety, William Harrah, Charles Brown nor John Harrah were qualified under the Bankruptcy Act, on behalf of Abbot Kinney Company, the alleged bankrupt, or at all, to defend against the Involuntary Petition in Bankruptcy filed herein, or to raise any issue regarding the sufficiency of the original or amended Involuntary Petition in Bankruptcy filed herein; and,

It Is Further Ordered that this Court has jurisdiction to hear and determine all of the issues raised by the Order to Show Cause above referred to and the Answers of respondents filed thereto.

BENNO M. BRINK

Referee in Bankruptcy [79]

## EXHIBIT "B"

In the District Court of the United States for the  
Southern District of California  
Central Division  
No. 43551-O'C.

In the Matter of ABBOT KINNEY COMPANY, a  
California corporation, Alleged Bankrupt.

OBJECTION OF CHARLES BROWN TO JURIS-  
DICTION OF THIS COURT IN RE ORDER TO  
SHOW CAUSE DATED JULY 7, 1945

Now comes respondent Charles Brown and appears  
specifically and objects to the jurisdiction of this court  
upon the following grounds:

I.

Objects to the jurisdiction of this court and any future  
proceedings herein on the ground that said amended in-  
voluntary petition in bankruptcy does not state facts suf-  
ficient to constitute an act of bankruptcy.

II.

That said amended involuntary petition in bankruptcy  
does not state facts sufficient to give to this court juris-  
diction in that no creditors entitled to file an involuntary  
petition in bankruptcy have signed or joined therein.

III.

That no receiver or trustee has been appointed and the  
alleged bankrupt cannot invoke the aid of this court to  
determine a controversy with an adverse claimant. [80]

IV.

That this court does not have possession of the prop-  
erty or of the subject matter of the controversy as set  
forth in said petition.

## V.

That the parties have stipulated and this court has approved said stipulation whereby the controversy between this objecting respondent will be postponed until the question of whether the above involuntary proceedings will be dismissed or an adjudication entered, all as provided in the stipulation on file herein.

Dated this 23rd day of July, 1945.

COBB & UTLEY

By FRANCIS B. COBB

Attorneys for Respondent Charles Brown [81]

State of California,  
County of Los Angeles—ss.

Charles Brown, being by me first duly sworn, deposes and says: That he is one of the Petitioners in the foregoing and above entitled action; that he has read the foregoing Petition for Review of Referee's Order and knows the contents thereof; and that same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true.

Charles Brown

Subscribed and Sworn to before me this 31st day of August, 1945.

[Notarial Seal]                              Blanche Morris

Notary Public in and for said County and State.

My Commission Expires July 22, 1947.

[Endorsed: Filed Sep. 12, 1945. [82]]

## [BANKRUPT'S EXHIBIT NO. 1]

Agreement made this 2nd day of June in the year one thousand nine hundred and thirty-one, by and between F. R. Cruickshank & Co. of the Pacific, a corporation duly incorporated under the laws of the State of California, hereinafter called the "Company," and Abbott-Kinney Co., a corporation duly incorporated under the laws of the State of California, hereinafter called the "Purchaser."

In Consideration of the covenants hereinafter contained, it is agreed as follows:

## CLAUSE I

This contract shall bind the parties herein named and their successors and assigns.

## CLAUSE II

Wherever, in this instrument the word "Assets" is used, it shall mean the existing buildings and the machinery and stock of merchandise therein, belonging to the Purchaser and located at: No. Pier Street Ocean Front (Office 68½ Windward Ave.) City of Los Angeles, Town of Venice, County of Los Angeles, State of California.

The purchaser warrants that it is the owner in fee of the assets and by lease and of the land whereon the same are situated, free and clear of all mortgages, encumbrances, liens, etc., except the following:

A bond indebtedness secured by trust indenture in the sum of \$350,000.00.

Real property located in the County of Los Angeles, State of California, more particularly described as follows:

Parcel 1: Lot "NN" of Venice of America, as per map recorded in Book 6, Pages 126 and 127 of Maps, Records of Los Angeles County, and that certain real property, all in the City of and County of Los Angeles, State of California, described as a whole as follows:—

Beginning at the most Easterly corner of Block 12 of County Club Tract, as per map recorded in Book 3, Page 76 of Maps, Records of said County; thence South 51°, 10', West, along the Southeasterly line of said Block 12 and the Southwesterly prolongation thereof, 199 feet, more or less to the Mean High Tide Line of the Pacific Ocean, as described in decree rendered July 31st, 1925, in Case No. 14056 Superior Court, entitled, "City of Venice, vs. Abbot Kinney Company at al." thence south 33°, 39', 30" East, along said Mean High Tide Line, 235.85 feet, more or less to the Southwesterly prolongation of the Southeasterly line of the above mentioned Lot "NN" thence North 51°, 10' East, along said last mentioned prolongation and Southeasterly line, 212 feet, more or less to the most Easterly corner of said Lot "NN"; thence North 36°, 49' West, along the Northeasterly line thereof 195.01 feet to the most Northerly corner of said Lot "NN"; thence North 36°, 49' West 40.02 feet, more or less, to the point of beginning.

Except the Northeasterly 20 feet thereof.

Also Except those portions thereof included within the lines of Market Street (formerly Zephyr Avenue), conveyed to the City of Ocean Park, by deed recorded in Book 4195, Page 124 of Deeds, Records of said County, more particularly described as follows: [83]

Beginning at a point which is South 51°, 12' West 40 feet distant from the most Southeasterly corner of Lot 5, Block "A," Venice of America Tract; thence South 51°, 12' West along the Northerly line of Cephyr Avenue, 353.10 feet; thence North 36° 47' West, along high tide line, 17.45 feet; thence North 53° 11' West, along a straight line, 332.85 feet; thence South 36° 47' East, along a line parallel to Ocean Front Walk, 5.93 feet to beginning.

Parcel 2: That portion of Lot "A" of Tract No. 898, as per map recorded in Book 16, Page 128 of Maps, in the office of the County Recorder of said County, bounded on the Northeast by the Northeasterly line of said Lot "A"; on the Southeast by the Southeasterly line of said Lot "A"; on the Southwest by the mean high tide line of the Pacific Ocean as established by decree rendered July 31st, 1925, in Case No. 140756, Superior Court, entitled "City of Venice, vs. Abbot-Kinney Company, et al." and on the Northwest by the Northwesterly line (and its prolongation Southwesterly) of Lot "MM", "Venice of America", as per map recorded in Book 6, Pages 126 and 127 of said Map Records.

Parcel 3: Those portions of Lots "B" and "C" of Tract No. 898, as per map recorded in Book 16, Page 128 of Maps, in the office of the County Recorder of said County, bounded on the Northeast by the Northeasterly lines of said Lots "B" and "C"; on the Southeast by the Southeasterly line of said Lot "C"; on the Southwest by the mean high tide line of the Pacific Ocean as established by decree rendered July 31st, 1925, in Case No. 140756, Superior Court, entitled: "City of Venice, vs. Abbot-

Kinney Company et al." and on the Northwest by the Northwesterly line of said Lot "B".

Excepting therefrom that portion of said Lot "C" conveyed to the City of Venice, by deed recorded in Book 6781, Page 234 of Deeds.

Parcel 4: Property described in that certain lease dated January 14, 1921, between the city of Venice (now city of Los Angeles) and Abbot Kinney Company, which said lease is of record in the office of the County Recorder of Los Angeles County, and as described by a decree rendered July 31, 1925, Case No. 140756, Superior Court of Los Angeles County, entitled "City of Venice vs. Abbot Kinney Company et al."

### CLAUSE III

The Company agrees to procure insurance policies at its own expense in companies authorized by the Insurance Departments of the State of California and/or \_\_\_\_\_

\_\_\_\_\_ insuring the Assets against fire for eleven years, beginning ten days after mailing of notice to the Purchaser by the Company for Four Hundred Thousand (400,000.00) Dollars, as follows:

#### Blanket

provided, however, that the Company in its discretion may at any time, by mailing written notice to the Purchaser at the address set forth herein, require the Purchaser to purchase its own insurance, and five days from date of mailing such notice the Company's obligation to procure insurance policies or keep the same in effect shall terminate, and the Company shall thereupon allow on account of payments to be made under this contract the premiums

required to be paid by the Purchaser, but which premiums in no event shall exceed the promulgated tariff rates.

#### CLAUSE IV

The Company agrees that on about September 1, 1931, it will cause to be installed in the premises described in Clause II, a Wet pipe system of approved fire extinguishing apparatus, consisting of automatic [84] sprinklers, pipe, fittings, hangers, valves, etc., hereinafter referred to as a "Sprinkler Equipment," in accordance with plans to be approved by the Insurance Body having jurisdiction and to maintain the same at its own expense for the period of this contract, Provided, however, that the Purchaser shall (and the purchaser) at all times during the life of this agreement supply at its own expense:

1. Sufficient space on the premises for materials and proper facilities for the prosecution of the work of installing, repairing and maintaining the sprinkler equipment.
2. Water, Steam, Heat, Power and Air which may be required and necessary to keep the sprinkler equipment in proper working order.
3. And further agrees to protect said apparatus from injury or destruction, and assumes full responsibility for the stability of the building, and every part thereof, for the placing and maintenance of the tank, if any, and its contents upon said building.

And Provided Further, that the Company shall not be liable for delay in installing said sprinkler equipment no matter how caused, except delay caused by its wilful fault.

And Provided Further, that should said sprinkler equipment of the assets be destroyed, in whole or in part,

by any cause, or abandoned, in whole or in part, by the Purchaser for any reason, then all obligations of the Company to maintain or repair said equipment shall cease and terminate, with respect to the whole or any part thereof so destroyed or abandoned, without liability on the part of the Company to refund payments theretofore made or otherwise.

#### CLAUSE V

The Purchaser agrees to pay the Company the following sums of money on the following dates:

Nineteen Thousand Five Hundred (19,500.00) Dollars  
upon installation of the sprinkler equipment and  
Nineteen Thousand Five Hundred (19,500.00) Dollars  
Sept. 1, 1932  
Nineteen Thousand Five Hundred (19,500.00) Dollars  
Sept. 1, 1933  
Nineteen Thousand Five Hundred (19,500.00) Dollars  
Sept. 1, 1934  
Nineteen Thousand Five Hundred (19,500.00) Dollars  
Sept. 1, 1935  
Nineteen Thousand Five Hundred (19,500.00) Dollars  
Sept. 1, 1936  
Nineteen Thousand Five Hundred (19,500.00) Dollars  
Sept. 1, 1937  
Nineteen Thousand Five Hundred (19,500.00) Dollars  
Sept. 1, 1938  
Nineteen Thousand Five Hundred (19,500.00) Dollars  
Sept. 1, 1939  
Nineteen Thousand Five Hundred (19,500.00) Dollars  
Sept. 1, 1940  
Nineteen Thousand Five Hundred (19,500.00) Dollars  
Sept. 1, 1941

The Purchaser may anticipate any or all of the above payments by deducting the amount of premiums to be paid for insurance not yet furnished at the published rate of the Board of Fire Underwriters of the Pacific, and discount the amount then due hereunder for all unpaid installments at the rate of seven (7) per cent per annum.

If the Purchaser fails to make any of the above payments on the date such payment is to be made, or otherwise fails to perform any term or condition hereof on its part to be performed, or makes any default hereunder, then, at the option of the Company, on thirty days notice in writing to the purchaser stating the default and demanding correction thereof, all payments then due or thereafter to become due hereunder shall forthwith become due and payable, and all the right, title and interest of the Purchaser in said equipment, or any other improvements placed upon the Assets or said land by the Company, shall at the option of the Company immediately cease, and the Company, with or without the aid of legal process, may at its option enter the Assets and [85] turn off the water from said equipment and remove the same and all improvements placed by the Company on the Assets or said land, whether or not attached to the realty, for which purpose said sprinkler equipment and improvements however attached shall at all times be deemed personal property severable from the realty without material injury to the freehold. The Company shall incur no liability in damages or otherwise for any act done in turning off said water, or in removing said equipment or improvements or any part thereof, or otherwise in the exercise of any right or privilege hereunder. If the Company removes said equipment or improvements, the Company may re-

tain all payments made by the Purchaser free and clear of any claim by the Purchaser. The Company, may at its option, if said equipment or improvements are retaken, sell the same or any part thereof, without previous demand on the Purchaser, and with or without notice, either at public or private sale, at which the Company may at its option purchase the same, and the Purchaser agrees to pay on demand any deficiency between the amount realized by such sale or sales of said equipment or improvements and any balance due or payable hereunder. The turning off of said water or retaking of said equipment and improvements shall be without prejudice to any other right reserved to the Company hereunder. The Company may at its option sue for and recover any payment or payments due hereunder without prejudice to its right to remove said equipment or improvements, or to any other right reserved to it hereunder.

During the life of this contract no discontinuance of ownership of the Assets by the Purchaser except as otherwise herein provided, shall terminate or affect the Purchaser's liability.

At the Company's option, the Purchaser shall be deemed to have made default hereunder if it be adjudicated a bankrupt or become insolvent, or if a receiver be appointed for it, or if it make a general assignment or trust for the benefit of creditors, or call a meeting of its creditors to ask any accommodation of them, or if a judgment be docketed against it and remain unsatisfied for a period of ten consecutive days, or if a lien in foreclosure of mechanics' lien, or other lien, be filed against the aforesaid Assets and remain a lien thereon for a period of ten consecutive days, or if an execution upon a judg-

ment be issued against the Purchaser and be returned unsatisfied.

### CLAUSE VI

The Purchaser agrees to permit the Company by or with the aid of others, to enter the premises and to install therein and to change and repair at the Company's own expense, the sprinkler equipment and such other improvements as it may at any time desire to make. Should the work of installation be discontinued from any cause, not the fault of the Company, except by fire, there shall immediately be due and payable to the Company a sum equal to the full aggregate payments above stated, less an allowance for insurance, materials, labor and expenses not supplied or incurred.

### CLAUSE VII

The title to said sprinkler equipment shall remain at all times in the Company until the Purchaser has duly performed all its obligations hereunder. The Company agrees that at the full termination of this contract and upon the faithful compliance by the Purchaser with the terms and conditions herein contained and the making of all the payments by it required to be made at the times fixed and specified for making the same, all improvements which the Company may place upon the premises and which then are in or upon said premises, shall become the sole property of the Purchaser and the Company shall make, execute, acknowledge and deliver at that time a proper bill of sale for the same to the Purchaser. [86]

### CLAUSE VIII

The Purchaser hereby employs the Company to negotiate all insurance upon the Assets during the period of this

contract. Should more or less insurance than the amount specified in Clause III be required by the Purchaser, the cost thereof to the Company shall be credited or charged to the Purchaser at the published rates of the insurance Body having jurisdiction. Nothing herein contained shall be construed to make or constitute the Company an insurer of the Assets of the Purchaser. The Purchaser agrees to comply with all the terms and conditions affecting co-insurance and other warranties and conditions which may be contained or be inserted in any policy of insurance delivered to it by the Company and that the Company shall not be liable for breach of any warranties, terms or conditions in any of said policies contained.

#### CLAUSE IX

The Purchaser agrees that it will pay all taxes and assessments levied against the Assets and that it will not do nor permit to be done anything which will increase the rate of insurance upon the Assets and will comply with all rules of the Insurance Body having jurisdiction or any other body or public authority which has made or may hereafter make any rules or regulations as to the terms and conditions of policies or rates or the use and occupancy of the Assets and if such rate of insurance be increased, because of failure to comply with the foregoing requirements, the Purchaser will pay on demand the additional premium charged by reason of such increase. In the event that any addition or alteration is made in the Assets or new building is erected on the premises during the term of this contract such new building, addition and/or alteration shall be equipped with a sprinkler equipment at the expense of the Purchaser in accordance with plans to be approved by the Company.

The Purchaser at its own expense will make all changes, repairs and improvements on the premises and comply with all requirements which may be demanded by the Insurance Body having jurisdiction or any public body or local authority.

#### CLAUSE X

The company to furnish necessary automatic sprinklers to meet the requirements of the Board of Fire Underwriters of the Pacific.

The company to install the necessary bulkheads beneath the pier, also to run sprinkler lines both sides of these bulkheads.

The company to furnish and erect one-one hundred thousand gallon steel gravity tank on a steel tower, also to provide foundation for said gravity tank and make all connections necessary for sprinkler system.

The company to make the necessary connections to city water mains.

The company to revamp the present automatic fire pump which is at present connected to the swimming pool of the Venice Plunge so that this secondary supply of water may be thrown into the automatic sprinkler system if required.

The company to paint sprinkler system with two coats of paint, where piping is exposed to view to match decorative scheme, thereafter the purchaser to repaint sprinkler system when required during the life of this contract.

All work to be subject to the approval of the Board of Fire Underwriters of the Pacific and the Los Angeles Building Ordinance. [87]

Addenda to Clause III: If at any time the purchaser can buy the insurance to be furnished under this contract at a lower rate than promulgated by the insurance body having jurisdiction or the rate at which the policies in effect at that time are written, then in that event the company must furnish the insurance at renewal at the same cost as would be produced by the new rate obtained by the purchaser and credit the difference in cost to the future payments to be made under this contract, or the purchaser has the right to eliminate the furnishing of insurance by the company and buy its own insurance direct and receive credit for the cost of such insurance at the rate offered by the company.

Addenda (A) to Clause IV: In event of partial destruction of the assets and purchaser rebuilds same, company agrees to reconstruct at its own expense the wet pipe sprinkler system affecting the part rebuilt of approximately the same number of sprinkler heads as before destruction. The definition of total destruction of the assets is to mean such damage which cannot be repaired in six months. In the event of partial destruction of the assets and the purchaser determines not to rebuild, then the purchaser may settle its obligations hereunder by paying the company the sum provided for in Paragraph V, Section 2 hereof, less such sum of money as the company may collect from insurance carried by it on such sprinkler equipment. In this connection the company agrees to carry full insurance on said sprinkler equipment.

Addenda (B) to Clause IV: In the event of total destruction of said assets as herein defined then all obligations of the purchaser and company hereunder shall cease.

Addenda to Clause V: The first payment due under this contract can be made by allowing the company to collect the unearned premium due on the insurance in effect at the time of the company furnishing the contract insurance and the balance of the \$19,500.00 after receiving credit for such return premium may be paid at the rate of \$1950.00 on the 1st day of each month until the full amount of such balance of said first installment of \$19,500.00 is paid without interest.

The right is reserved to the Company to inspect the Assets at all reasonable time. No obligations other than herein expressly set forth shall be binding on the Company and no representations, verbal or otherwise, shall affect this contract if not contained herein. All changes in this contract shall be initialed by an officer of the Company.

This contract shall not be binding upon the Company until signed by an executive officer of the Company, and the seal of the Company affixed hereto at the Company's principal place of business in the City and County of San Francisco, State of California.

If the Purchaser is an individual, or if there is more than one Purchaser, all changes in the wording of this agreement necessary to meet such conditions shall be considered made. If there is more than one Purchaser, all Purchasers shall be liable hereunder jointly and severally.

In Witness Whereof this agreement has been duly executed, in triplicate, by the parties hereto, as witness, the

signatures of the duly authorized officers and the corporate seals thereof.

### In Presence of:

(Corporate Seal) F. R. CRUICKSHANK & CO.  
OF THE PACIFIC  
By H. S. West  
Vice Pres.  
(Corporate Seal) ABBOTT-KINNEY CO.  
By Sherwood Kinney  
Pres.  
By Edward A. Gerety Jr.  
Asst. Secy. [88]

State of California  
County of Los Angeles—ss.

On this 2nd day of June, 1931, before me, Frances McCourt, a Notary Public in and for the County of Los Angeles, State of California, residing therein, duly commissioned and sworn, personally appeared H. S. West, known to me to be the Vice President of F. R. Cruikshank & Co. of the Pacific, the corporation that executed the within instrument, and acknowledged to me that such corporation executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal at my office in the County of Los Angeles, State of California, on the day and year in this certificate first above written.

(Seal) Frances McCourt

Notary Public in and for the County of Los Angeles,  
State of California.

State of California  
County of Los Angeles—ss.

On this 2nd day of June, 1931, before me, Frances McCourt, a Notary Public in and for the County of Los Angeles, State of California, residing therein, duly commissioned and sworn, personally appeared Sherwood Kinney, known to me to be the President of Abbot Kinney Co. and Edward A. Gerety, Jr., Ass't Secretary of Abbot Kinney Co., the corporation that executed the within instrument, and acknowledge to me that such corporation executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal at my office in the County of Los Angeles, State of California, on the day and year in this certificate first above written.

(Seal)

Frances McCourt  
Notary Public in and for the County of Los Angeles,  
State of California.

Recorded as instrument 1274 on June 6, 1931, in Book 10877 at Page 246 of Official Records of Los Angeles County, California. [89]

## SUPPLEMENTAL AGREEMENT

This Supplemental Agreement, made and entered into as of the 29th day of December, 1937, by and between F. R. Cruikshank & Co., a corporation, hereinafter called "First Party," and Abbot-Kinney Company, a corporation, hereinafter called "Second Party,"

Witnesseth:

Whereas, on and as of the 2nd day of June, 1931 an agreement in writing was entered into by and between F. R. Cruikshank & Co., of the Pacific, a corporation, therein called "the Company," and Second Party, therein called "the Purchaser," which agreement provides for the installation by the Company of a wet pipe system of approved fire extinguishing apparatus, therein referred to as "sprinkler equipment," in and on certain property then and now owned by Second Party, located in the City of Los Angeles, County of Los Angeles, State of California, to which contract specific reference is hereby made; and

Whereas, on and as of the 10th day of August, 1931 said F. R. Cruikshank & Co. of the Pacific, a corporation, assigned to First Party its entire right, title, and interest in and to said agreement and all of its right, title, and interest in and to said sprinkler equipment, and by virtue thereof First Party is now, and since the 10th day of August, 1931 has been, the sole owner of all rights, privileges, and benefits of said F. B. Cruikshank & Co. of the Pacific in, under, and by virtue of said contract, and is now, and since the 10th day of August, 1931 has been, the sole owner of said sprinkler equipment; and [90]

Whereas, Second Party is now in default under the terms of said agreement to the extent of \$57,501.30 plus

accrued interest up to October 1, 1937 in the sum of \$8,374.56; and

Whereas, it is the desire of the parties hereto to cause said default of Second Party to be cured by the provisions hereof and to modify said contract in certain particulars;

Now, Therefore, it is hereby agreed:

1. First Party is hereby relieved of any obligation to procure any insurance policies insuring any of the assets of Second Party.

2. First Party hereby waives all accumulated interest on past due installments under the terms of said agreement; and hereby waives all existing defaults of Second Party under the terms of said agreement, but without prejudice to any rights it might have in the event Second Party become in default under said contract, as hereby modified, at any time hereafter.

3. It is hereby agreed that the unpaid balance of the sums required to be paid to First Party by Second Party under the terms of said agreement, exclusive of accumulated interest, waived as aforesaid, and after crediting insurance premiums which would have been paid by First Party but for the provisions of paragraph 1 hereof, totals One Hundred Thirty-seven Thousand One Hundred Eighty-one and 30/100 (\$137,181.30) Dollars, which sum Second Party agrees to pay in cash, lawful money of the United States, in installments as follows:

\$30,000.00 on December 8, 1938;  
\$30,000.00 on December 8, 1939;  
\$30,000.00 on December 8, 1940;  
\$30,000.00 on December 8, 1941;  
\$17,181.30 on December 8, 1942.

[Written in margin]: Notify to Put in Condition]

4. Second Party agrees to maintain the sprinkler [91] system mentioned and described in said contract in good order and condition at its own cost and expense until all sums required to be paid by Second Party to First Party under the terms of said contract, as hereby modified, shall have been paid in full; and in the event Second Party shall fail so to do after receiving thirty (30) days notice in writing from First Party, First Party shall have the option of accelerating the due date of all then unpaid installments under the terms of said contract, as hereby modified.

5. Notwithstanding anything herein of in said contract to the contrary, Second Party shall have the right to remove or otherwise dispose of not to exceed ten (10%) per cent of said sprinkler equipment at any time subsequent to payment of the \$30,000.00 installment due on December 8, 1938, as herein provided, and may remove or otherwise dispose of an additional ten (10%) per cent of said sprinkler equipment after each additional \$30,000.00 installment shall have been paid, as herein provided, provided such partial removal or disposition can and will be effected without damaging or diminishing the usefulness or value of the remainder of said sprinkler equipment.

6. In the event of any conflict between the provisions of said contract and this Supplemental Agreement the provisions of this Supplemental Agreement shall prevail; but, except as hereby expressly modified, said contract and the rights, benefits, and privileges of First Party as the assignee of F. R. Cruikshank & Co. of the Pacific, a corporation, are hereby reaffirmed and readopted.

In Witness Whereof, First Party causes this Supplemental Agreement to be executed by its President, duly authorized so to do, and Second Party causes this Supplemental Agreement to [92] be executed by its officers, duly authorized so to do, on the day and date first above noted.

F. R. CRUIKSHANK & CO.

By H. S. West

President

First Party

(Abbot-Kinney Company

Corporate Seal) ABBOT-KINNEY COMPANY

By Sherwood Kinney

President

By Carleton Kinney

Secretary

Second Party [93]

The question of executing the Supplemental Agreement between F. R. Cruikshank & Co. and Abbot Kinney Company was then discussed. The supplemental agreement offered by F. R. Cruikshank & Co. was presented and upon motion duly made, seconded and unanimously passed, the following resolution was adopted:

Resolved: That the President and Secretary of the Company shall be and are hereby authorized and directed to execute said Supplemental Agreement with F. R. Cruikshank & Co. for and on behalf of Abbot Kinney Company.

---

I, Carleton Kinney, Secretary of Abbot Kinney Company, do hereby certify that the foregoing is a full, true and correct copy of a resolution duly passed at a special meeting of the Board of Directors held on December 23, 1937 at 526 Bank of America Building, Los Angeles, California, and that said resolution is still in full force and effect and has never been revoked.

(Corporate Seal)

CARLETON KINNEY

Secretary of Abbot Kinney Company, a California Corporation [94]

## SECOND SUPPLEMENTAL AGREEMENT PARTIES

F. R. Cruikshank & Co., a corporation, referred to as "First Party,"

Abbot-Kinney Company, a corporation, referred to as "Second Party."

## RECITALS

A. On and as of the 2nd day of June, 1931, an agreement in writing was entered into by and between F. R. Cruikshank & Co. of the Pacific, a corporation, therein called "the Company," and Second Party, therein called "the Purchaser," which agreement provides for the installation by the Company of a wet pipe system of approved fire extinguishing apparatus, therein referred to as "sprinkler equipment," in and on certain property then and now owned by Second Party, located in the City of

Los Angeles, County of Los Angeles, State of California,  
to which contract specific reference is hereby made.

B. On and as of the 10th day of August, 1931 said F. R. Cruikshank & Co. of the Pacific, a corporation, assigned to First Party its entire right, title, and interest in and to said agreement and all of its right, title, and interest in and to said sprinkler equipment, and by virtue thereof First Party is now, and since the 10th day of August, 1931 has been, the sole owner of all rights, privileges, and benefits of said F. R. Cruikshank & Co., of the Pacific in, under, and by virtue of said contract, and is now, and since the 10th day of August, 1931 has been, the sole owner of said *prinkler* equipment. [95]

C. On and as of the 29th day of December, 1937 the parties hereto entered into a Supplemental Agreement, modifying in certain particulars therein recited said agreement dated the 2nd day of June, 1931.

D. All payments provided to be made under said agreement dated the 2nd day of June 1931 as supplemented by said agreement dated the 29th day of December, 1937 are now past due, the Statute of Limitations on such payments is about to toll, and in order to avoid litigation the parties desire to enter into this agreement for the purpose of waiving the Statute of Limitations to the date hereof.

#### TERMS

1. Second Party acknowledges and agrees that it is indebted to First Party under said agreement dated the 2nd day of June, 1931 as supplemented by said Supple-

mental Agreement dated the 29th day of December, 1937 in the total sum of \$137,181.30 plus accrued interest.

2. Second Party waives the Statute of Limitations accrued to the date hereof against its obligation to First Party under said agreement dated the 2nd day of June, 1931 as supplemented by said Supplemental Agreement dated the 29th day of December, 1937.

3. First Party waives all accrued interest on Second Party's obligation to it under said agreement dated the 2nd day of June, 1931 as supplemented by said Supplemental Agreement dated the 29th day of December, 1937.

Executed in duplicate original on and as of the 14th day of January, 1943.

F. R. CRUIKSHANK & CO.

By H. S. West

President

First Party

(Corporate Seal)

ABBOT-KINNEY COMPANY

By Carleton Kinney

President

By W. Thos. Davis

Secretary

Second Party [96]

Re No. 43,551-O'C. Abbot-Kinney Co., Bankrupt. Bankrupt's Exhibit No. 1. Filed July 24, 1945. Benno M. Brink, Referee.

[Endorsed]: Filed Sep. 12, 1945. [97]

## [BANKRUPT'S EXHIBIT NO. 2]

## AGREEMENT

Know All Men By These Presents:

The undersigned, F. R. Cruikshank & Co., a corporation organized and existing under the laws of the State of New York, for a valuable consideration, hereby sells, assigns, and transfers, without warranty, to Charles J. Brown, his heirs, executors, administrators, and assigns, the entire right, title, and interest of the undersigned in and to the following documents:

1. Agreement dated June 2, 1931 between F. R. Cruikshank & Co. of the Pacific, a California corporation, referred to as "Company", and Abbot Kinney Co., a California corporation, referred to as "Purchaser", recorded on June 6, 1931 in Book 10877 at page 246 of Official Records of Los Angeles County, California, which contract was assigned to the undersigned on August 10, 1931;
2. Supplemental Agreement dated December 29, 1937 between the undersigned and Abbot Kinney Company, supplementing and modifying in certain particulars contract No. 1; and
3. Second Supplemental Agreement dated January 14, 1943 between the undersigned and Abbot Kinney Company, supplementing and modifying in certain particulars contract No. 1.

This assignment is intended to and does vest in Charles J. Brown, his heirs, executors, administrators, and assigns, all rights of the undersigned in and to the documents described heretofore accrued, presently existing, and

any that may arise hereafter, but without warranty or representation by or on behalf of the undersigned, including the right to collect, sue for, and recover all funds now due or which hereafter may become due thereunder, all to the same extent and with the same rights, privileges, and powers that the undersigned would have but for this assignment. [98]

This assignment has been executed on March 4, 1944, but shall not be effective until the 13 day of June, 1944, which is the date of delivery hereof to the Assignee.

Executed in New York, New York, on March 4, 1944.

F. R. CRUIKSHANK & CO.

By H. S. WEST

president

By H. O. DORR

secretary [99]

State of New York

County of New York—ss:

On the 4th day of March, nineteen hundred and forty-four before me personally came H. S. West, to me known, who, being by me duly sworn did depose and say that he resides in Bronxville, N. Y., that he is the President of F. R. Cruikshank & Co., the corporation described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by the order of the Board of Directors of said corporation, and that he signed his name thereto by like order.

Notary Public Seal

ELIZABETH E. OWENS

Notary Public

Re No. 43,551-O'C. Abbot-Kinney Co., Bankrupt.  
Bankrupt's Exhibit No. 2. Filed July 24, 1945. Benno  
M. Brink, Referee.

[Endorsed]: Filed Sep. 12, 1945. [100]

---

[BANKRUPT'S EXHIBIT NO. 3]

ABBOT KINNEY COMPANY  
Founders of Venice of America  
11 Venice Pier ~~1619~~ Ocean Front  
Venice, California

Venice, Calif., June 23, 1944  
90-766 Venice Branch 90-766  
Security-First National Bank  
of Los Angeles  
Venice, Calif.

Pay Seven Thousand – five hundred & 00/100 \* \*  
Dollars \$7,500.00

to the  
Order Charles J. Brown  
of

ABBOT KINNEY COMPANY  
John Harrah  
Carleton Kinney

[Stamped]: Paid 6-27-44  
Charles J. Brown

[Stamped]: Paid 6-27-44

Re No. 43,551 O'C. Abbott-Kinney Co., Bankrupt.  
Bankrupt's Exhibit No. 3. Filed July 24, 1945. Benno  
M. Brink, Referee.

[Endorsed]: Filed. Sep. 12, 1945. [101]

## [BANKRUPT'S EXHIBIT NO. 4]

Owners and Operators	Telephones
Venice Pier	Main Office 62122
Venice Plunge	Venice Plunge 61529

ABBOT KINNEY COMPANY  
Founders of Venice of America  
1619 Ocean Front  
Venice, California

Nov 6th 1944

Abbot Kinney Co

Gentlemen,

By reason of the contention among interests in the company I insist that a definite arrangement be made regarding the sprinkler system.

I now offer to accept from you immediately a cash payment of \$30,000.00 for which I will give credit on the contract for \$50,000.00 upon the following conditions.

You do by this acceptance acknowledge that the balance then remaining unpaid is approximately \$80,000.00 which is [102]

2

now due and which you promise to pay.

I agree to not turn the water off from the system for a period of one year from this date, except that I may turn the water off at any time if the company is adjudged a bankrupt, or a receiver appointed for the company or for the property covered by the trust indenture or if any of the present directors are removed or if the executive committee is changed or its powers restricted.

I retain all my rights under the contract including the rights to bring suit now or at any future time for the balance unpaid.

Chas. J. Brown [103]

Accepted by,  
Abbot Kinney Company,  
By Carleton Kinney  
president

Re No. 43,551 O'C. Abbott-Kinney Co., Bankrupt.  
Bankrupt's Exhibit No. 4. Filed July 24, 1945. Benno  
M. Brink, Referee.

[Endorsed]: Filed Sep. 12, 1945. [104]

---

[BANKRUPT'S EXHIBIT NO. 5]

ABBOT KINNEY COMPANY  
Founders of Venice of America  
1619 Ocean Front  
Venice, California

Venice, Calif., November 8, 1944  
90-766 Venice Branch 90-766  
Security-First National Bank  
of Los Angeles  
Venice, Calif.

No. 739

Pay Thirty Thousand & 00/100 \* \* \* Dollars \$30,000.00  
to the  
Order Charles J. Brown  
of

ABBOT KINNEY COMPANY  
John Harrah  
Carleton Kinney

[Stamped]: Paid 11-8-44

Charles J. Brown

[Stamped]: Paid 11-8-44

Re No. 43,551 O'C. Abbott-Kinney Co., Bankrupt.  
Bankrupt's Exhibit No. 5. Filed July 24, 1945. Benno  
M. Brink, Referee.

[Endorsed]: Filed Sep. 12, 1945. [105]

---

[BANKRUPT'S EXHIBIT NO. 6]

[Crest]

HARRAH'S BINGO  
242 N. Virginia

Reno, Nevada  
November 30, 1944

Abbot Kinney Co.  
11 Venice Pier  
Venice, Calif.

Gentlemen:

On November 25, 1944 I purchased from Charles J. Brown a one-third interest in the Sprinkler System and contract, and when any payments are made, one-third of the amount should be paid to me.

Yours truly,

William F. Harrah

WFH:ma

WILLIAM F. HARRAH

Re No. 43,551 O'C. Abbott-Kinney Co., Bankrupt.  
Bankrupt's Exhibit No. 6. Filed July 24, 1945. Benno  
M. Brink, Referee.

[Endorsed]: Filed Sep. 12, 1945. [106]

## [BANKRUPT'S EXHIBIT NO. 7]

F. R. CRUIKSHANK & CO.  
Automatic Sprinklers-Insurance  
55 Liberty Street  
New York, N. Y.

5

June 6th, 1944.

Abbott-Kinney Company,  
Windward Avenue,  
Venice, Los Angeles,  
California.

Gentlemen:—

Referring to the Contract by and between F. R. Cruikshank and Co., of the Pacific and Abbott-Kinney Co., under date of June 2nd, 1931, covering the installation of automatic sprinkler equipment and other fire protection devices, which Contract was sold, assigned, transferred and conveyed to F. R. Cruikshank & Co., under date of August 10, 1931, and to the Supplemental Agreement of the above referred to Contract entered into between F. R. Cruikshank & Co., and Abbott-Kinney Co., under date of December 29, 1937, and also to Second Supplemental Agreement dated January 14, 1943, we beg to advise you that we hereby declare the Contract in Default and that all payments due thereunder amounting to One Hundred Thirty-Seven Thousand One Hundred Eighty-One Dollars and Thirty Cents (\$137,181.30) plus accrued interest, are past due and we hereby make demand upon you for full payment.

In accordance with Clause 5 of the Contract of June 2, 1931, you are receiving thirty days notice in writing

stating the default and demanding correction thereof, prior to our taking such action as turning off the water from the automatic sprinkler system and removing same, or such other action as we deem necessary to protect our interests.

This letter is your formal notice that in the event your default is not corrected and payment of \$137,181.30 plus accrued interest not made on or before July 10, 1944, we intend to proceed to turn off the water and prepare the system for removal and/or sale as we deem best. All proceeds from such sale will be credited against your indebtedness and you will be held liable for any deficiency.

Prior to turning off of the water, we will notify the underwriters association having jurisdiction in order that the insurance interests may have full knowledge that protection of the sprinkler system is being discontinued and we assume no liability for such discontinuance.

Very truly yours,

F. R. CRUIKSHANK & CO.,

H. V. Dorr

H. V. Dorr,

HSW:MAC

Secretary-Treasurer.

Re No. 43,551 O'C. Abbott-Kinney Co., Bankrupt.  
Bankrupt's Exhibit No. 7. Filed July 24, 1945. Benno  
M. Brink, Referee.

[Endorsed]: Filed Sep. 12, 1945. [107]

## [BANKRUPT'S EXHIBIT NO. 8]

BAMBU HUT  
25 Windward Ave.  
Venice, California

Phone 63415

No. 6118

Endorsement of Check by Payee  
Acknowledges Payment in Full of  
Account Itemized Below.

Description	Amount
Sprinkler	

Venice, Calif., Nov 25 1944

Pay to the Order of Chas. J. Brown	\$3000.00
Three Thousand Dollars	

BAMBU HUT

By John Harrah

Venice Branch  
Security-First National  
Bank of Los Angeles  
90-766 Windward & Trolleyway  
12 Venice

[Stamped]: Paid 11-28-44

Chas. J. Brown

[Stamped]: Paid 11-28-44

Re No. 43,551-O'C. Abbott-Kinney Co., Bankrupt.  
Bankrupt's Exhibit No. 8. Filed July 25, 1945. Benno  
M. Brink, Referee.

[Endorsed]: Filed Sep. 12, 1945. [108]

## [BROWN'S EXHIBIT NO. 1]

SECURITY-FIRST NATIONAL  
BANK OF LOS ANGELES

## Customer's Statement

[ ]  
 CHAS J. BROWN  
 [ ]

Figures in  
this column  
are for  
Bank Book-  
keeper's use  
and are not  
part of your  
statement.

Old Balance	Checks	Checks	Checks	Deposits	New Balance
Balance Brought Forward <del>1</del>					
				May 2 '44	7,258.29 s
1,112.68 —				May 3 '44	6,145.61 s
9.60 —				May 3 '44	6,136.01 s
18.00 —	300.00 —			May 5 '44	5,818.01 s
110.01 —				May 6 '44	5,708.00 s
10.00 —	57.70 —	33.60 —	817.86		
200.00 —			1,584.60	May 9 '44	7,809.16 s
52.64 —				May 10 '44	7,756.52 s
5.00 —				May 12 '44	7,751.52 s
423.62 —	217.20 —	51.92 —			
260.87 —				May 13 '44	6,797.91 s
20.00 —			905.00	May 15 '44	7,682.91 s

1.50 —		463.79	May 17 '44	8,145.20 s
423.28 —	146.62 —	5.14 —		
1,483.02 —	33.60 —		May 18 '44	6,053.54 s
100.00 —			May 19 '44	5,953.54 s
		159.88		
		1,025.00		
		349.38	May 22 '44	7,487.80 s
47.70 —	1.98 —	106.00		
		423.46	May 23 '44	7,967.58 s
22.50 —			May 24 '44	7,945.08 s
10.00 —	652.52 —		May 25 '44	7,282.56 s
100.00 —	152.51 —	15.00 —		
1.00 —			May 26 '44	7,014.05 s
		10.00	May 27 '44	7,024.05 s
.50		328.65	May 29 '44	7,352.20 s
140.07 —	10.00 —	100.00	May 31 '44	7,302.13 s
		359.12		
		102.80	Jun 1 '44	7,764.05 s
158.00 —	58.26 —		Jun 2 '44	7,547.79 s
5.00 —	600.19 —		Jun 3 '44	6,942.60 s
225.00 —			Jun 5 '44	6,717.60 s
490.00 —		277.50		
		1,305.93	Jun 6 '44	7,811.03 s

**IMPORTANT — DEPOSITOR PLEASE NOTE**

Please Reconcile Your Statement and Vouchers as Soon as Possible After Receiving. If No Error Is Reported Within Ten Days, This Account and Vouchers Will Be Considered Correct.

SECURITY-FIRST NATIONAL  
BANK OF LOS ANGELES

## Customer's Statement

[ ]  
CHAS J. BROWN  
[ ]

Figures in  
this column  
are for  
Bank Book-  
keeper's use  
and are not  
part of your  
statement.

Old Balance	Checks	Checks	Checks	Deposits		New Balance
Balance Brought Forward 						
					Jun 6 '44	7,811.03 s
101.17 —	190.51 —	94.38 —			Jun 7 '44	7,424.97 s
10.00 —			200.00	Jun 9 '44		7,614.97 s
162.76 —	225.82 —	190.57 —		Jun 9 '44		7,035.82 s
100.00 —	22.75 —	5,000.00 —	1,618.56			
52.64 —			409.91	Jun 13 '44		3,888.90 s
80.00 —				Jun 14 '44		3,808.90 s
796.82 —				Jun 15 '44		3,012.08 s
189.38 —	100.00 —	10.00 —	195.00			
			890.00			
				210.00	Jun 16 '44	4,007.70 s

3.23 —				Jun 20 '44	4,004.47 s	
137.31 —	100.00 —	374.63 —	86.00	105.00	Jun 21 '44	3,583.53 s
75.00 —			174.80	216.40	Jun 22 '44	3,899.73 s
				109.00	Jun 23 '44	4,008.73 s
10.00 —					Jun 24 '44	3,998.73 s
100.00 —				7,545.00	Jun 26 '44	11,443.73 s
1,547.14 —				1,396.12	Jun 27 '44	11,382.71 s
68.65 —	193.00 —	138.71 —	1.00	284.32	Jun 28 '44	11,267.67 s
10.00 —	10.29 —			109.63	Jun 29 '44	11,357.01 s

**IMPORTANT—DEPOSITOR PLEASE NOTE**

Please Reconcile Your Statement and Vouchers as Soon as Possible After Receiving. If No Error Is Reported Within Ten Days, This Account and Vouchers Will Be Considered Correct.

Re No. 43551-O'C. Abbot Kinney Co., Bankrupt.  
 Brown's Exhibit No. 1. Filed July 26, 1945. Benno M. Brink, Referee.

[Endorsed]: Filed Sep. 12, 1945. [109]

[BROWN'S EXHIBIT NO. 2]

[Crest]

SECURITY-FIRST NATIONAL BANK OF  
LOS ANGELES

Savings      Commercial      Trust

Venice Branch

Windward &amp; Trolleyway

Venice, California

July 25, 1945

Mr. Charles J. Brown  
Venice, California

Dear Mr. Brown:

In reply to your request for information on cashier's checks purchased by you on June 13, 1944, No. 815902 in the amount of \$5000.00 and No. 815906 in the amount of \$6000.00. Both were made payable to H. S. West and endorsement reads H. S. West by H. Darling, attorney in fact. These checks were paid June 20, 1944. Cashier's check No. 815035 was purchased by you March 2, 1944, in the amount of \$3800.00 and was cashed by you June 5, 1944.

Our records show the following dates of entrances in your safe deposit box for the year 1944:

January 3, 1944

" 11 "

" 20 "

February 9 "

" 23 "

April	5	"
"	"	"
"	12	"
"	21	"
May	31	"
June	2	"
"	"	"
"	13	"
"	"	"
"	26	"
July	6	"
August	29	"
Sept.	14	"
"	19	"
Dec.	14	"
"	"	"

Yours very truly,

R. E. Cole

R. E. Cole

Assistant Manager

Re No. 43,551-O'C. Abbott-Kinney Co., Bankrupt.  
Brown's Exhibit No. 2. Filed July 26, 1945. Benno M.  
Brink, Referee.

[Endorsed]: Filed Sep. 12, 1945. [110]

[BROWN'S EXHIBIT NO. 3]

3/2/44 19—

Received from

SECURITY-FIRST NATIONAL BANK OF  
LOS ANGELESThirty five hundred and no/100 Dollars \$3500.00  
(Written Amount Here)

Chas. J. Brown

(Present Address—If Recently Changed)

Account No. C

For Teller's Use

\$.....

[Stamped]: Paid 3-4-44

Counter Receipt—Not Negotiable

This Receipt Is for Use Only at the Counter of the Bank  
by the Drawer Personally

[Written]: BEW

[Stamped]: Paid 3-4-44

Re No. 43551 O'C. Abbott-Kinney Co., Bankrupt.  
Brown's Exhibit No. 3. Filed July 26, 1945. Benno M.  
Brink, Referee.

[Endorsed]: Filed Sep. 12, 1945. [111]

## [BROWN'S EXHIBIT NO. 4]

## RECEIPT

The undersigned, Charles J. Brown, acknowledges receipt from Guthrie & Darling, attorneys for F. R. Cruikshank & Co., a New York corporation, of the following documents:

1. Executed duplicate original of agreement dated June 2, 1931 between Abbot-Kinney Company, a California corporation, and F. R. Cruikshank & Co. of the Pacific, a California corporation;
2. Executed original assignment of the above agreement from F. R. Cruikshank & Co. of the Pacific, a California corporation, to F. R. Cruikshank & Co., a New York corporation;
3. Executed original Supplemental Agreement dated December 29, 1937 between F. R. Cruikshank & Co. and Abbot-Kinney Company;
4. Executed original of Second Supplemental Agreement between F. R. Cruikshank & Co., and Abbot-Kinney Company; and
5. Executed original assignment from F. R. Cruikshank & Co. to the undersigned, Charles J. Brown, dated March 4, 1944 and effective as of June 13, 1944, assigning to the undersigned the right, title, and interest of F. R. Cruickshank & Co., without warranty, documents 1, 3, and 4 above listed.

Dated: June 13, 1944.

Charles J. Brown

The undersigned, Guthrie & Darling, acknowledge receipt from Charles J. Brown of the following cashiers checks, each dated June 13, 1944 and each to the order of H. S. West:

1. Drawn against Bank of America, International Office, Los Angeles, No. 201691 in the amount of \$1,500.00;
2. Drawn against the Venice Branch of Security-First National Bank of Los Angeles, Clearing House 90-766, No. 815906 in the sum of \$6,000.00;
3. Drawn against the Venice Branch of Security-First National Bank of Los Angeles, Clearing House 90-766, No. 815902 in the sum of \$5,000.00; and [112]
4. Drawn against Ocean Park Branch of Security-First National Bank of Los Angeles, Clearing House 90-333, No. 218883 in the sum of \$2,500.00;

representing the full consideration for the assignment listed in the above receipt and delivery of the documents above described.

Dated: June 13, 1944.

GUTHRIE & DARLING

By Hugh W. Darling

Re No. 43,551-O'C. Abbot Kinney Co., Bankrupt.  
Brown's Exhibit No. 4. Filed July 26, 1945. Benno M.  
Brink, Referee.

[Endorsed]: Filed Sep. 12, 1945. [113]

## [BANKRUPT GERETY'S EXHIBIT NO. 1]

## AGREEMENT

This Agreement, dated the 23rd day of December, 1937, by and between J. L. Williams, I. Edward Robbin and William Harrah, hereinafter referred to as the "Williams group", and Moses C. Davis, W. Thomas Davis and Alfred A. Newton, hereinafter referred to as the "Newton group",

Witnesseth:

Whereas, the Williams group owns \$196,000 par value Abbot Kinney Company 7% Sinking Fund Gold Bonds, which bonds are now in escrow with the California Trust Company; and,

Whereas, there are issued and outstanding in more than 95,000 shares of stock of Abbot Kinney Company of which the Newton group owns 47,000 shares and controls 9,000 shares thereof; and,

Whereas, the parties hereto have determined to pool said stock and bonds and to use the same and distribute the proceeds derived therefrom on the basis and in the manner hereinafter set forth;

Now, Therefore, in consideration of the premises and the covenants of the parties hereinafter contained,

It Is Hereby Agreed as Follows:

## I.

That the Williams group shall forthwith deliver to the California Trust Company, as depositary, the above mentioned \$196,000 par value Abbot Kinney Company 7% Sinking Fund Gold Bonds, free and clear of any and all liens, encumbrance or assessments, and the Newton

group shall forthwith deliver to the California Trust Company, as such depositary, said 56,000 shares of stock of Abbot Kinney Company, free and clear of any and all liens, encumbrances or assessments.

## II.

That said bonds and stock and any other bonds or stock of Abbot Kinney Company hereinafter acquired by the parties hereto and deposited with said depositary hereunder, and any moneys and/or property derived therefrom, shall be held by said California Trust Company, as depositary, subject to unanimous [114] written consent of the parties hereto and said depositary shall only be authorized to account in regard to said bonds and/or stock and/or moneys and/or property in the manner and to the extent set forth in said written instructions. That the Williams group and Newton group, and each of them, may each act through their designated agent, provided they advise the depositary in writing of the appointment of such an agent and the acts of any however so appointed shall be binding upon his premises until such time as said depositary shall be advised in writing to the contrary.

## III.

That none of the parties hereto will purchase, either directly or indirectly, any additional bonds and/or stock of the Abbot Kinney Company without first obtaining the consent of all of the parties hereto to such purchase. That in the event of any such purchase, of stock and/or bonds of Abbot Kinney Company so purchased shall accrue to the benefit of the Williams and Newton groups and the stock and/or bonds so purchased shall be forthwith delivered to the California Trust Company, as depositary, subject to the above mentioned terms and conditions.

## IV.

That none of the bonds of Abbot Kinney Company now owned or hereafter acquired by any of the parties hereto will be used in foreclosing the Abbot Kinney Trust Indenture securing said bonds prior to April 1st, 1941; provided, however, that in the event the Abbot Kinney Company shall fail to renew any lien hereafter placed upon the property affected by said bonds, by persons other than the parties hereto, whether by judgment or otherwise, within ninety (90) days after such lien becomes final, and said lien is for an amount in excess of \$1,000, or if said Abbot Kinney Company shall, before said 1st day of April 1941, be adjudicated an involuntary bankrupt by a court of competent jurisdiction or petition of promises other than the parties hereto, then the above mentioned bonds may be used to foreclose said Trust Indenture; provided, further, however, that in the event of any such foreclosure prior to April 1st 1941, all of the bonds then held by the parties hereto pursuant to the terms of this agreement, shall be used for the purchase of the assets of said trust to the extent necessary to actually purchasing the same and the property so purchased shall forthwith be deeded to a new corporation organized by the parties hereto, and as the stockholders of the Abbot Kinney Company at the time of such foreclosure, [115] (even though no parties to this agreement) shall receive the number of shares of stock in said new corporation necessary to maintain the respective interest each had in the assets of the Abbot Kinney Company just prior to such foreclosure. That it is the declared policy of all other parties hereto to liquidate the present indebtedness of Abbot Kinney Company through sale of assets of said Abbot Kinney Company, if such is possible, there be no

foreclosure of the Trust Indenture. That all of the parties hereto shall and by these persons do hereby consent to the amendment to the Abbot Kinney Company Trust Indenture in the form which has now been approved by the Corporation Commissioner of the State of California and all of said parties and forthwith instruct the California Trust Company, as Trustee under the Abbot Kinney Company Trust Indenture, and shall discontinue any foreclosure proceedings or other action, heretofore commenced by the Williams group through Wm. G. Bonelli.

## V.

That all parties hereto will use their best efforts to cause the said Abbot Kinney Company in the most expedient manner consistent with good business practice, to dispose of sufficient assets of said Abbot Kinney Company to liquidate its entire bonds indebtedness at the earliest possible date.

## VI.

That all of the parties hereto consent to, and the Directors hired by the Williams and Newton groups shall vote for the execution of a supplemental agreement between Abbot Kinney Company and F. R. Cruikshank Co., hereby the indebtedness of approximately \$137,000 owing due for the F. R. Cruikshank Company from said Abbot Kinney Company, payable as follows: \$30,000 on or before December 8th, 1938 and the sum of \$30,000 on or before December 8th of each year thereafter until the full indebtedness due said F. R. Cruikshank Co. has been paid, said indebtedness not to bear interest and Abbot Kinney Company not to be entitled to any rebate for pre-payment of principal. That until such an agreement with F. R. Cruikshank Co. had actually been entered into by

Abbot Kinney Company, the terms of this agreement shall have due force and effect. In the event the agreement, principal F. R. Cruikshank Co., and Abbot Kinney Company, is not actually executed within thirty (30) days from the date hereof, the Williams group may at their option forthwith terminate this agreement and [116] *and* upon such termination the parties hereto shall be relegated to the same position in which they were prior to the execution of this agreement.

## VII.

That the Williams group shall forthwith return to H. S. West the sum of \$11,000 heretofore advanced by him to said Newton group (\$10,000 of which was delivered to the Williams group by Moses C. Davis). The obligations incurred by the Newton group to pay to H. S. West \$12,500 shall be met out of the first moneys derived from the above mentioned bonds, or any of them.

## VIII.

That the Williams group shall forthwith advance the sum of \$6,250 to the Newton group to take care of obligations incurred by the Newton group to persons other than H. S. West.

## IX.

That the Williams group will hold the Newton group harmless from any claims of Louis and/or George Kaufman, in a sum not exceeding \$9,000 arising from, or in any way connected with the attempted purchase of bonds by Moses C. Davis from Wm. G. Bonelli, which bond purchase deal is now in escrow with the California Trust Company.

**X.**

That out of the moneys received from the sale, and/or other disposal of and/or accrual to the above mentioned bonds or any bonds hereafter acquired by the parties hereto, the following sums will be paid and in the following order: to-wit;

- (a) the sum of \$12,500 to H. W. West;
- (b) Reimbursement to the Williams group of \$6,250 advanced to the Newton group hereunder and of all sums of money, of any paid by the Williams group to Louis Kaufman and/or George Kaufman, pursuant to the terms of this agreement, and of \$11,000 paid to H. S. West;
- (c) Payment to the Williams group of \$142,100;
- (d) Payment of any of the parties hereto of any moneys hereafter expended by them in purchasing any additional bonds of Abbot Kinney Company;
- (e) Payment to the Newton group of \$56,000;
- (f) The remaining money shall be paid one-half to the Williams group and one-half to the Newton group. [117]

**XI.**

That out of the moneys received from the sale and/or ordered disposal of and/or accrual to the above mentioned stock or of any additional Abbot Kinney Company stock hereafter acquired by the parties hereto, by dividends or through liquidation, or otherwise, the following sums of money will be paid in the following order, to-wit:

- (a) Payment to the Newton group of the difference between the amount they have theretofore received pursuant to Paragraph X, Subd (e) above and the sum of \$112,000;

- (b) Payment to any of the parties hereto of any moneys hereafter expended by them in purchasing any additional stock of Abbot Kinney Company;
- (c) The remaining moneys shall be paid one-half to the Williams group and one-half to the Newton group.

## XII.

That Moses C. Davis hereby declares that he holds the agreement between himself and the Abbot Kinney Company dated the 15th day of October, 1937, for the purchase of certain properties of Abbot Kinney Company, in trust for all of the parties hereto. That Moses C. Davis shall use so many of the above mentioned \$196,000 of bonds as are necessary to consummate the pending sales of Abbot Kinney Company property to the City and/or county of Los Angeles and any money so received by Moses C. Davis from such transaction shall be delivered through the escrow opened to consummate such sale, to the California Trust Company, as such depositary, and the escrow instruction shall so provide, and said money so deposited with such depositary in the manner hereinabove provided.

## XIII.

That in all actions of the Board of Directors of Abbot Kinney Company, the Williams and Newton groups shall each have the right to elect not less than two of such Directors. That immediately on the execution of this agreement, there shall be elected to the Board of Directors of Abbot Kinney Company, two members nominated by the Williams group.

## XIV.

That in the event any dispute arises between the parties hereto under this agreement (including but not limited to a dispute as to the instructions that are to be given to the depositary and/or the voting trustee) of the Newton [118] and Williams groups shall each appoint one arbitrator and the two arbitrators so appointed shall then appoint a third and the three arbitrators so appointed shall settle the difficulty existing between the two groups and the decision so reached by said three arbitrators shall be binding upon all of the parties hereto.

## XV.

That the voting Trust Agreement for the \$56,000 shares of stock which above tentatively entered into between W. Thomas Davis, Alfred A. Newton and Sherwood Kinney, shall be actually consummated, after obtaining a permit from the Corporation Commissioner of the State of California and the corporation of such consummation shall be divided equally between the Williams and Newton groups. Said voting Trust Agreement shall be amended, however, to provide that the Williams group shall at all times be entitled to appoint one trustee, the Newon group shall be entitled to appoint one and Sherwood Kinney shall be entitled to appoint one, and that said three trustees so appointed shall only vote in the manner there pursuant to the unanimous writing instruction of the parties hereto. That as the sum of \$112,000, as provided for in Paragraph XI, subd. (a) hereof above paid to the Newton group, voting trust certificates representing 28,000 share of stock of Abbot Kinney Company shall be transferred to the Williams group and a similare amount shall be transferred to the Newton group and that shall thereafter be the respective *owns* thereof.

## XVI.

That the Williams group and the Newton group, and each of them do hereby release and discharge the other from any claim or claims, cause or causes of action, right, or damages which either has or claim to have against the other as a result of, or in any way arising out of the above mentioned bond purchase agreement between Moses C. Davis and William G. Bonelli and/or any attempted sale of property to the City or County of Los Angeles and will accept the rescission of the above mentioned bond purchase agreement heretofore served upon Moses C. Davis by the Williams group.

In Witness Whereof, the parties hereto have executed this agreement as of the day and year first above mentioned. [119]

I. EDWARD ROBBIN

(Signed)

I. Edward Robbin

WILLIAM HARRAH

(Signed)

William Harrah

I. EDWARD ROBBIN

(Signed)

By L. M. Halper (Signed)

WILLIAM HARRAH

(Signed)

By John Harrah (Signed)

W. THOS. DAVIS

(Signed)

W. Thos. Davis

ALFRED A. NEWTON

(Signed)

Alfred A. Newton.

Moses C. Davis (Signed)

By M. Philip Davis

(Signed)

Re No. 43551-O'C. Abbot Kinney Co., Bankrupt.  
Gerety's Exhibit No. 1. Filed July 25, 1945. Benno  
M. Brink, Referee.

[Endorsed]: Filed Aug. 31, 1945 at ..... min. past 4  
o'clock P. M. Benno M. Brink, Referee; Florence Robin-  
son, Clerk.

[Endorsed]: Filed Sep. 12, 1945. [120]

[Title of District Court and Cause.]

PETITION IN INTERVENTION IN OPPOSITION  
TO AMEND INVOLUNTARY PETITION ON  
FILE HEREIN

To the Honorable Hugh L. Dickson, Referee in Bankruptcy:

The verified petition in intervention of Harold B. Pool, a creditor herein, and John Harrah, director, and Carleton Kinney, stockholder, respectfully shows:

I.

That on or about the 2nd day of October, 1944, a petition in involuntary bankruptcy was filed against Abbot Kinney Company, a California corporation, and thereafter on the 28th day of February, 1945, a creditors' first amended involuntary petition was filed and as to which petition the alleged bankrupt, Abbot Kinney Company, a California corporation, through its attorneys of record, Grainger & Hunt, filed an answer. That hearing on said petition and answer has been set for July 25, 1945, before the Honorable Hugh L. Dickson as Referee in Bankruptcy. [121]

II.

That your petitioner Harold B. Pool is a creditor of said alleged bankrupt and has a provable general unsecured claim fixed as to liability and liquidated as to amount, which claim arose by reason of legal services furnished to the alleged bankrupt within two years last past, that the reasonable value of said services was and is the sum of \$579.50, no part of which has been paid and the entire sum remains now due, owing and unpaid.

## III.

That petitioner Carleton Kinney is the owner and holder of 9,300 shares of the capital stock of the alleged bankrupt.

## IV.

That John Harrah is a director of the alleged bankrupt and that the Board of Directors consist of six members composed of your petitioner and Al Newton, M. P. Davis, W. Thomas Davis, M. W. Young and Lewis Helper. That W. Thomas Davis is the president and M. P. Davis is a brother of W. Thomas Davis and is the secretary. That said last two named parties are attorneys at law. That the involuntary petition in bankruptcy and the amended petition was filed by three petitioning creditors who are represented by Nicholas & Davis, a law firm in which M. P. Davis, secretary of the alleged bankrupt, is a partner.

## V.

That your petitioners are informed and believe and upon said information and belief allege that M. P. Davis recommended to said corporation the employment of the firm of Grainger & Hunt as attorneys for the corporation and has conferred with them in respect to said matter and is working with said attorneys so that the alleged bankrupt has no independent disinterested counsel or officer or representative to present legal and equitable defenses to the above entitled proceeding. [122]

## VI.

That your petitioner alleges that the above entitled proceeding should be dismissed on the ground and for the reason that said amended involuntary petition does not

state facts sufficient to constitute an act of bankruptcy or on which an order of adjudication can be entered for the following reasons:

1. That on the 23rd day of June, 1944, when the alleged act of bankruptcy was alleged to have been committed, said petition does not allege nor is it shown therefrom that there existed any other unsecured creditors of the same class as the said Charles Brown, E. A. Gerety, William Harrah and John Harrah or either of them. That petitioner is informed and believes and upon information and belief alleges that said company had no other creditors at said time other than creditors whose claims were secured and that the security possessed by said secured creditors was in excess of the value of their claims against the alleged bankrupt.
2. That said involuntary petition shows upon its face that the petitioning creditors did not have unsecured claims against the Abbot Kinney Company and that their claims are not fixed as to liability or liquidated in amount, since the petition shows that they are holders of bonds issued by the Abbot Kinney Company and that said trust indenture securing said first mortgage bonds has not been foreclosed and said parties are not creditors entitled to file a voluntary petition under the Bankruptcy Act as amended.

## VII.

That the answer of the alleged bankrupt does not set up the defenses hereinabove alleged and your petitioners are advised that said defenses will not be set up even though the Board of Directors of the Abbot Kinney Company did by resolution authorize the employment of coun-

sel to defend the corporation against said involuntary petition. That the corporate offices are held and the corporation's affairs are being exercised by the said W. Thomas Davis [123] M. P. Davis and that demands have been made on the attorney for the Company to assert the defenses above alleged, but said demands have not been complied with.

### VIII.

That petitioners desire to intervene and that your intervening petitioners in defense of said first amended involuntary petition do hereby admit, deny, allege and plead defenses in respect thereto as follows:

### IX.

1. That the Abbot Kinney Company, a California corporation is not insolvent in that it possesses assets in excess of its liabilities and that your petitioner is informed and believes and upon information and belief alleges that any claim that might be asserted by the trustee under said trust indenture and note in respect to bond issue dated and issued on or about the 1st day of April, 1931, is barred by the Statute of Limitations and the law of the State of California, to-wit, Section 337, subdivision 1, Code of Civil Procedure.

2. The reasonable market value of the alleged bankrupt's property is the sum of \$400,000.00. That the alleged bankrupt's obligations other than said bond indenture on which \$269,000.00 in bonds is outstanding, do not exceed the sum of \$80,000.00. That said other obligations except for current claims are secured by security in excess of the reasonable market value of the obligation.

## X.

That the trust indenture securing said bonds provides on page 65, Section 1, Article 11:

"All rights of action on or because of the bonds issued hereunder or the interest coupons thereto appertaining and all rights of action under this indenture are hereby expressly declared to be vested exclusively in the Trustee, except only as hereinafter provided; and such [124] rights may be enforced by the Trustee without the possession of any of the bonds issued hereunder or the interest coupons thereto appertaining. Any suit or proceeding instituted by the Trustee shall be brought in its name as Trustee, and any recovery or judgment shall be for the pro rata benefit of the bonds issued hereunder and the interest coupons thereto appertaining. Section 2. Any requesting direction, resolution or other instrument required by this indenture to be signed and executed by bondholders may be in any number of concurrent writings of similar tenor, and may be signed or executed by such bondholders in person or by attorney or agent appointed in writing. Proof of the execution of any such request, direction, resolution or other instrument, or of the writing appointing any such attorney or agent, and of the ownership of bonds, if made in the following manner, shall be sufficient for any purposes of this indenture and shall be conclusive in favor of the Trustee with regard to due action taken by it under such request.

Section 3. No holder of any bond or coupon secured hereby shall have the right to institute any

suit, action or proceeding at law or in equity, upon or in respect of this indenture or for the execution of any trust or power hereof or for the appointment of a receiver or for any other remedy under or upon this indenture, unless such holder shall previously have given to the Trustee written notice of an event of default, and unless also the holders of Twenty-five (25%) percent in amount of the bonds secured thereby then outstanding shall have made written request [125] upon the Trustee and shall have afforded to it a reasonable opportunity either to proceed itself to exercise the power hereinbefore granted, nor to institute such action, suit or proceeding in itself or may, and unless also such holders shall have offered to the Trustee reasonable security and indemnity against costs, expenses and liabilities to be incurred in or by reason of such action, suit or proceeding; and the Trustee shall have refused or neglected to comply with such request within a reasonable time thereafter. Such modification, request and offer of indemnity are hereby declared in every such case at the option of the Trustee to be conditions precedent to the execution of the actions and trusts of this indenture and to any action or cause of action for foreclosure or for any other remedy hereunder. It is understood, intended and hereby provided that no one or more holders of bonds or coupons shall have any right in any manner whatever to affect, disturb or prejudice the lien of this indenture by his or their action, or to enforce any right hereunder, except in the manner herein provided, and that all proceedings hereunder shall be instituted, had and

maintained in the manner herein provided for the equal benefit of all holders of such outstanding bonds and coupons."

That the California Trust Company is the acting trustee of said bond indenture. That petitioner is informed and believes and upon information and belief alleges that a demand has been made by the holders of the bonds upon said trustee to take action in respect to foreclosing said indenture or enforcing the payment thereof. [126]

## XI.

Further answering the first amended involuntary petition your petitioner alleges that the three petitioning creditors, to-wit: Frank Williams, Moses C. Davis and Charles W. Cradick are not creditors of said Abbot Kinney Company but merely hold bonds under said trust indenture and that all rights to take any action against the alleged bankrupt is vested in the California Trust Company and that said petitioning creditors nor do any of them have as alleged in paragraph 4 of their petition or otherwise, a provable general unsecured claim against Abbot Kinney Company and do not have claims fixed as to liability or liquidated as to amount and further deny that the aggregate amount of said petitioning creditors claims that are provable against the above entitled estate are in excess of \$500.00 but allege that said petitioning creditors have no provable unsecured claims in any amount whatever.

## XII.

That your petitioners in answer to paragraph 5 of the creditors' first amended involuntary petition admits that on or about the 1st day of April, 1931, the Abbot Kinney

Company executed a trust indenture and issued bonds thereunder in the amount as alleged in said paragraph 5 but deny that there is any obligation existing on behalf of Abbot Kinney Company to the holders of said bonds for the reason that said obligations created by said bond indenture have become barred by the Statute of Limitations, Section 337, subdivision 1, Code of Civil Procedure. Further answering said paragraph 5, these intervenors deny that the assets of Abbot Kinney Company have a value of less than \$100,000.00 than the total amount due on principal and interest to the holders of said bonds under the trustee of said trust indenture but alleges the true facts to be that the assets of said company to be in excess of \$400,000.00 and that said obligations to the holders of said bonds and to the trustee of said indenture is barred by the Statute of Limitations as hereinabove alleged. [127]

### XIII.

Further answering paragraph 6 of creditors' first amended involuntary petition, your intervenors deny that the payment made on June 23, 1944, of \$7500.00 constituted a preference or that said payment preferred said Charles Brown, Ed Gerety, William Harrah and John Harrah or either of them over the other creditors of said Abbot Kinney Company. Further alleges the true facts to be that said \$7500.00 was paid only to Charles Brown and Ed Gerety, that at the time of said payment there were no creditors in the same class as the parties receiving the said payment and that no preference was committed or was there any intent to prefer said parties receiving said \$7500.00 over other creditors of the alleged bankrupt in the same class as the parties receiving said

payment. That said payment was made in the ordinary course of business for a good and valuable consideration.

Wherefore your petitioner prays that the above entitled proceeding be dismissed and that your petitioner be given such further relief as is just and proper in the premises.

HAROLD B. POOL  
CARLETON KINNEY  
JOHN HARRAH

Intervenors [128]

[Verified.]

Received Jul. 18, 1945. Nicholas & Davis, GBA. [129]

Received copy of within this 18 day of July, 1945.  
Grainger & Hunt, Attorney for Alleged Bankrupt.

[Endorsed]: Filed Jul. 19, 1945 at ..... min. past 9 o'clock A. M. Hugh L. Dickson, Referee.

[Endorsed]: Filed Sep. 12, 1945. [130]

—

[Title of District Court and Cause.]

NOTICE OF MOTION ON PETITION TO  
INTERVENE

To: Abbot Kinney Company, a California corporation,  
alleged bankrupt and its attorneys of record, Grainger & Hunt, and to the petitioning creditors and their attorneys of record, Nicholas & Davis

You and each of you will please take notice that on Monday, July 23, 1945, at the hour of 10 o'clock A. M., before the Honorable Hugh L. Dickson, Referee in Bank-

ruptcy, Room 339 Federal Building, Temple & Spring Streets, Los Angeles, California, Harold B. Pool, a creditor herein, and John Harrah, director, and Carleton Kinney, will make a motion through their attorneys of record, Cobb & Utley, to intervene in the above entitled proceeding and to oppose the amended involuntary petition in bankruptcy.

You are further notified that said motion will be made upon the files and records of the proceeding herein and upon the affidavit of Harold B. Pool and upon the petition in intervention, [131] a copy of which is being served with this notice of motion.

You are further notified that said motion will be made upon the points and authorities attached hereto and upon the ground that the jurisdiction of the above entitled court is sought to be invoked by petition of three bondholders who are not creditors and who do not have provable claims and upon the further ground that the corporation is dominated and controlled by the attorneys for the petitioning creditors and said defenses cannot be invoked on behalf of said corporation and that the attorneys for said corporation have refused to set forth said defenses on behalf of said corporation.

COBB & UTLEY

By Francis B. Cobb

Received Jul. 18, 1945. Nicholas & Davis, GBA.

Received copy of within this 18 day of July, 1945. Grainger & Hunt, by A. O. C., Attorneys for Alleged Bankrupt.

[Endorsed]: Filed Jul. 19, 1945 at ..... min. past 9 o'clock A. M. Hugh L. Dickson, Referee.

[Endorsed]: Filed Sep. 12, 1945. [133]

[Title of District Court and Cause.]

## AMENDED ANSWER OF ALLEGED BANKRUPT

To the Honorable J. F. T. O'Connor, Judge of the District Court of the United States, for the Southern District of California:

A petition having been filed in the above entitled Court on the 21st day of October, 1944, praying that your respondent, the alleged bankrupt above named, be adjudged a bankrupt, a First Amended Petition having been filed herein thereafter on the 21st day of February, 1944, and an answer to the first amended petition having been filed, and by stipulation of the parties and order of the Court your respondent having been permitted to file its amended answer to said first amended petition, your respondent now appears and answers the said amended petition as follows:

### I.

Respondent admits the allegations contained in Paragraphs 1 and 2 of said first amended involuntary petition. [134]

### II.

Respondent denies each and every allegation contained in Paragraph 3 of said First Amended Involuntary Petition, except that it admits it is not a wage earner or a farmer.

## III.

Respondent denies each and every allegation contained in Paragraph IV of the said First Amended Involuntary Petition, except that it admits that each of the petitioning creditors is the owner and holder of certain bonds issued by the alleged bankrupt corporation pursuant to permit of the Commissioner of Corporations, and which said bonds are among bonds issued or held by the public.

## IV.

Respondent denies each and every allegation contained in Paragraph 5 of said amended involuntary petition, except that it admits that on the 1st day of April, 1931, Abbott-Kinney Company issued its trust indenture securing an authorized issue of \$350,000.00 First Mortgage 7% Sinking Fund Gold Bonds, and there is presently outstanding and unpaid \$269,000.00 principal amount of said bonds.

Respondent further admits that the alleged bankrupt also owes taxes which are liens against the property securing the said bonds in a sum in excess of \$75,000.00.

Respondent further admits that the petitioners own certain of the bonds aforesaid, but is without information or belief as to the total amount owned by said individuals, and its denial of the amount of the bonds owned by them is based on that ground.

In respect to said alleged indebtedness of said petitioning creditors, respondent alleges that any alleged indebtedness owing to said petitioners, or any of them, is barred

by the sections of the Code of Civil Procedure of the State of California pertaining to limitations prescribed for the commencement of actions, and particularly is barred by the provisions of Subdivisions 1 and 2 of Section [135] 336-A of the said Code of Civil Procedure of the State of California.

## V.

Respondent admits that the sum of \$7500.00 was paid to Charles Brown, but denies each and all of the other allegations of Paragraph 6 of said first amended involuntary petition.

Wherefore, said Abbott Kinney Company, the alleged bankrupt, prays that it should not be adjudged bankrupt for any cause in said first amended petition alleged, and prays a hearing thereon and that the petition herein be dismissed with costs.

ABBOTT KINNEY COMPANY

By W. Thos. Davis

President

GRAINGER AND HUNT

By K. Z. Grainger

Attorney for Alleged Bankrupt —[136]

[Verified.]

[Endorsed]: Filed Jul. 20, 1945 at ..... min. past 10 o'clock A. M. Hugh L. Dickson, Referee.

[Endorsed]: Filed Sep. 12, 1945. [137]

[Title of District Court and Cause.]

[ORDER]

This is a review of the order made and entered by Referee Benno M. Brink, dated August 23, 1945.

The matter will be held under submission and in abeyance until there is filed with the court findings and report of the referee in bankruptcy, Benno M. Brink, as special master. When the court is in possession of these facts, the issues involved in the voluntary petition in bankruptcy and the answer thereto, the court will be in a better position to act.

The files show clearly that the petitioning creditors and alleged bankrupt have stipulated under date of January 8, 1945 that the said issues would be prosecuted with due diligence. The court made an order wherein the issues presented by the involuntary petition and the answer were referred to Benno M. Brink, referee, for hearing and report as special master, on July 24, 1945. The court is not advised the cause of this long delay. The attention of the special master is called to Rule 53 D (1) of Federal Rules of Civil Procedure: "It is the duty of the Master to proceed with all reasonable diligence".

It Is Therefore Ordered that the said special master proceed with the hearing of said controversy heretofore referred to him by order dated July 24, 1945.

Dated December 14, 1945.

J. F. T. O'CONNOR

Judge

[Endorsed]: Filed Dec. 14, 1945. [138]

[Title of District Court and Cause.]

MOTION FOR DISMISSAL AND NOTICE OF  
HEARING THEREON

To the Above Named Alleged Bankrupt and Its Attorneys of Record, Grainger & Hunt; and to the Petitioning Creditors and Their Attorneys of Record, Nicholas & Davis:

You and Each of You Will Please Take Notice, that Harold B. Pool will, on March 11, 1946, at the hour of 10 o'clock A. M. or as soon thereafter as counsel may be heard, make a motion before the Honorable J. F. T. O'Connor, Judge of the above entitled Court in the Federal Bldg. Los Angeles, California, to dismiss the above entitled proceedings and all proceedings pending before any Special Master or Referee in Bankruptcy, and for an order revoking all references in respect to the above entitled proceedings; said motion will be made upon the ground,

I

That the above entitled Court has no jurisdiction of the above entitled proceeding in that no creditor entitled to file an involuntary petition in bankruptcy against the above named alleged bankrupt has signed the amended involuntary petition in bankruptcy or has joined therein.

[139]

II

That the amended involuntary petition in bankruptcy does not state facts sufficient to institute an act of bankruptcy.

## III

That an order of this Court made on December 14, 1945 has been ignored and violated.

## IV

That the petitioning creditors and their attorneys have been guilty of laches.

You Are Further Notified that said motion will be made upon the files and records of the proceeding herein and upon the affidavit of Harold B. Pool, a creditor, and upon the points and authorities attached hereto.

COBB & UTLEY

By Francis B. Cobb [140]

## POINTS AND AUTHORITIES

Section 59a of the Bankruptcy Act, Central Illinois v. Flori Pipe Co., 133 Fed. (2d) 657, 660, is as follows:

"Since the amendment of 1938, it is doubtful if a single creditor whose claim is secured, even though the debt greatly exceeds the security, may qualify as one who can file an involuntary petition in bankruptcy without giving up his security. The Act, 11 U. S. C. A. sec. 95, requires that petitioner's claim be 'fixed as to liability and liquidated as to amount.' Inasmuch as a secured creditor has a petitioning claim only for the difference between the amount of the debt and the value of the security, his claim is not liquidated. He therefore must fail to measure up to the qualifications of a petitioning creditor in an involuntary petition unless he waive his security."

See Remington, Section 254, 1944 Supplement, page 104.

The Involuntary Petition Does Not State an Act of Bankruptcy.

It is alleged in paragraph 6 of the amended petition that the alleged bankrupt paid out of its assets to Charles Brown et al, "the sum of \$7,500.00 on an antecedent debt due them by Abbot Kinney Company, which payment was made for the purpose and with the intent of preferring said Charles Brown, et al., over the other creditors of said Abbot Kinney Company."

This allegation is insufficient to constitute an act of bankruptcy in that it does not allege or show that the parties receiving the payment were unsecured creditors or that they were in the same class as the petitioning creditors or that there were any other creditors in the same class as the parties receiving the payment.

If Charles Brown had a valid mortgage or conditional sales contract and payment could be made to him as alleged in the petition, [141] the same would not constitute a voidable preference.

Remington, Vol. 5, Sec. 2289, states:

"Each element of the preference must be alleged and proved."

Remington, Vol 4A, Sec. 1701, discussing the fourth element, states the rule:

"Who Are Creditors of the Same Class. It was ruled in an early case of the eighth circuit which

has been universally followed that the classes referred to are the classes in which creditors are grouped by Sec. 64, 11 USCA Sec. 104, for the purpose of priority in distribution.

In re Star Spring Bed Co., 257 F 176, 43 ABR 328 (1919; CCA NJ), (affirmed in 265 F 133, 45 ABR 650), Davis, District Judge: "The referee further states that

'A point not argued, but appearing to me to be decisive of this case, is that one essential element of a voidable preferential transfer is entirely lacking that is, the effect of the transfer must be to enable the creditor to obtain a greater percentage of his debt than other creditors of the same class. . . . Here, however, is a creditor holding security who surrenders it and receives other security. What creditors 'of the same class' are there over whom he has acquired a preference? There is no proof that there were any'."

It is essential that an act of bankruptcy be alleged or there is no jurisdiction. The rule is stated in Remington, Vol. 1, Sec. 107.

See Rule 53 D 1, Fed. Rules of Civil Procedure.

Respectfully submitted,

COBB & UTLEY

By Francis B. Cobb [142]

[Affidavit of Service by Mail.]

[Endorsed]: Filed Feb. 28, 1946. [143]

[Title of District Court and Cause.]

AFFIDAVIT IN SUPPORT OF MOTION TO  
DISMISS

State of California

County of Los Angeles—ss.

Harold B. Pool, being first duly sworn, deposes and says:

That he is a creditor of the above named alleged bankrupt, and has a provable, general, unsecured claim, fixed as to liability, and liquidated as to amount, which claim arose by reason of legal services furnished to the alleged bankrupt within two years last past. That the reasonable value of said services was and is the sum of \$579.50, no part of which has been paid and the entire sum now remains due, owing, and unpaid.

That on or about the 2nd day of October, 1944, a petition in involuntary bankruptcy was filed against Abbot Kinney Company and thereafter on the 28th day of February, 1945, a creditors' first amended involuntary petition was filed; that an answer was filed to said amended involuntary petition and the same was set for hearing on July 25, 1945, and has been continued from time to time thereafter.

That the above entitled Court directed, by order of December [144] 14, 1945, that all issues raised by the amended involuntary petition and the alleged bankrupt's answer thereto, be determined by Benno M. Brink, Special Master.

That your petitioner has heretofore moved the Special Master to dispose of said involuntary petition and that other parties in interest have asked that said matters be disposed of on the ground that the involuntary petition

is fatally defective in its face, in that (a) the petitioning creditors are bond holders and are not entitled to file an involuntary petition since their obligation is still secured by their bond indenture and all rights of individual bond holders are vested in the Trustee for all bond holders under the terms of said trust indenture securing said bonds, (b) that the amended involuntary petition does not state an act of bankruptcy, (c) that the alleged bankrupt's amended answer shows the additional defenses of:

1. The petitioning creditors' claims are barred by the Statute of Limitations.

2. That the corporation was not insolvent at the time of the commission of the alleged act of bankruptcy.

That the affairs of the corporation and the rights of creditors are being materially injured by the delay and dilatory practices resorted to by the attorneys for the petitioning creditors and the attorneys for the alleged bankrupt; that your petitioner is unable to levy attachments upon the assets of the corporation or proceed to judgment upon his claim.

Wherefore, affiant prays that the above proceeding be dismissed and for such other and further relief as is just and proper in the premises.

HAROLD B. POOL

Subscribed and sworn to before me, this 28 day of Feb., 1946

MYRTLE I. RUSSELL

Notary Public in and for said County and State. [145]

[Affidavit of Service by Mail.]

[Endorsed]: Filed Feb. 28, 1946. [146]

[Title of District Court and Cause.]

Appearances:

Nicholas & Davis, 634 South Spring Street, Los Angeles 14, California, VAndike 6121, Attorneys for Petitioning Creditors.

Grainger & Hunt, 354 South Spring Street, Los Angeles 13, California, TRinity 0649, Attorneys for Alleged Bankrupt.

REPORT OF SPECIAL MASTER ON INVOLUNTARY PETITION IN BANKRUPTCY

To the Honorable J. F. T. O'Connor, Judge of the above entitled Court:

I, Benno M. Brink, one of the Referees in Bankruptcy of this court, before whom the above entitled matter is pending, as Special Master, do hereby report as follows:

This is a proceeding in involuntary bankruptcy, commenced October 21, 1944, in which the pleadings now before the Court are a First Amended Involuntary Petition, filed February 28, 1945, and an Amended Answer thereto, filed July 20, 1945.

The sole act of bankruptcy alleged in the First Amended Involuntary Petition is that the alleged bankrupt, while insolvent and within four months preceding the commencement of this proceeding, paid to Charles Brown and others the sum of \$7500.00 upon an antecedent debt, with the intent, so it is alleged, of preferring the said Charles Brown and his associates over other creditors of the alleged bankrupt. [147]

The Amended Answer admits the payment of the sum of \$7500.00 to Charles Brown, but denies all of the

other allegations of the First Amended Involuntary Petition with respect to the commission of the alleged act of bankruptcy. The Amended Answer also raises the issue as to whether the petitioning creditors are qualified, under the Bankruptcy Act, to file an involuntary bankruptcy petition against the alleged bankrupt and the Amended Answer alleges that, if the petitioning creditors are so qualified, their claims are barred by the Statute of Limitations.

The payment of \$7500.00 admitted by the alleged bankrupt to have been made to Charles Brown was in connection with a certain "sprinkler" contract upon which, on its face, the alleged bankrupt was indebted for a very substantial sum of money. Shortly before the \$7500.00 payment was made the alleged bankrupt's creditor on this contract had assigned it to Brown upon the payment to the said creditor of the sum of \$15,000.00. After this bankruptcy proceeding had commenced the further sum of \$30,000.00 out of the bankrupt's funds was paid to Brown on the said contract leaving still, on its face, a substantial amount owing thereon.

A bitter controversy arose over the said \$30,000.00 payment and in course of time the money was deposited with the Clerk of this Court, under an amended stipulation which was filed in this case on January 17, 1945.

This entire matter was first referred to Referee Hugh L. Dickson, one of the Referees in Bankruptcy of this Court. After proceeding with the case for some time Referee Dickson disqualified himself and the matter was referred to me.

On November 3, 1944, the alleged bankrupt filed its motion to dismiss the involuntary petition herein. On

February 15, 1945 Referee Dickson, upon the stipulation of the parties, granted this motion, with leave to amend. Thereupon, on February 28, 1945, the First Amended Involuntary Petition in this case was filed. [148]

On December 19, 1944, a petition for the appointment of a receiver was filed in this matter. On January 17, 1945 Referee Dickson filed his order denying the said petition without prejudice.

On July 19, 1945 Harold B. Pool, a creditor, John Harrah, director, and Carleton Kinney, stockholder, filed a Petition in Intervention in Opposition to the First Amended Involuntary Petition in this matter and their Notice of Motion on the said petition. The said motion to intervene was denied by Referee Dickson and after the case had been referred to me the motion was renewed and was again denied.

Thereafter I heard and determined the controversy on the \$30,000.00 on deposit with the Clerk and ruled that \$7500.00 thereof should be paid to Brown and \$22,500.00 to the alleged bankrupt. I further held that the sprinkler contract was fully paid and that the alleged bankrupt had no further liability thereon. A review was taken from my order in the premises and the same is now pending before Your Honor.

The amended stipulation, under which the \$30,000.00 was deposited with the Clerk, was entered into by Brown, by the petitioning creditors in this case and by the alleged bankrupt. The amended stipulation provided, among other things, that "proceedings to determine the sufficiency of the said involuntary petition, or amendments thereto, shall be prosecuted with due diligence, and all other mat-

ters pertaining to the solvency or insolvency of the alleged bankrupt, and the commission by it of an act, or acts, of bankruptcy, shall likewise be prosecuted with due diligence." The amended stipulation also provided that the parties thereto should have at least five days notice of all hearings in this proceeding.

The First Amended Involuntary Petition was not brought on for hearing before I heard and determined the \$30,000.00 controversy and thereafter the hearing on said petition was continued from time to time by consent of counsel for the petitioning creditors and counsel [149] for the alleged bankrupt.

In connection with the aforesaid review of the order relating to the \$30,000.00 controversy, Your Honor, on December 14, 1945, made an order in which reference was made to the aforesaid stipulation and to the order of reference in this matter. In the said order Your Honor directed me, as Special Master, to proceed with the hearing on the involuntary petition in bankruptcy.

Thereupon I notified counsel in the case to prepare for an early hearing. In due time counsel submitted to me a stipulation which was intended to limit the issues to be heard and determined. I informed counsel that I could not proceed in the matter in the manner provided for by the stipulation unless and until they secured from Your Honor an appropriate modification of the order of special reference in this matter. This was not done and after some delay, due largely to the attendance of one of counsel at the session of the State Legislature, of which he is a member, I set the matter definitely for hearing on March 8, 1946.

At that time counsel presented a revised stipulation which limited the issues to be determined to two items: (1) the ownership of the sprinkler system which the alleged bankrupt had acquired under the sprinkler contract here involved; and (2) the ownership of the \$30,000.00 on deposit with the Clerk. The stipulation provided that if the Special Master found that the sprinkler system belonged to the alleged bankrupt, free and clear of any claim or lien thereon or thereto, and if the Special Master further found that the alleged bankrupt was the owner of not less than \$20,000.00 of the money on deposit with the Clerk, the Special Master might also find that the alleged bankrupt was solvent and recommended to the Court that the involuntary proceeding be dismissed. The stipulation further provided, in effect, that if the Special Master found otherwise than above stated he might also find that the alleged bankrupt was insolvent and recommend that an order of adjudication be entered. [150]

By the stipulation the alleged bankrupt, in effect, waived all of its defenses to the First Amended Involuntary Petition except the defense of solvency and as to that issue both the petitioning creditors and the alleged bankrupt agreed that it might be determined on the two points hereinbefore mentioned.

Francis B. Cobb, Esq., of the law firm of Cobb and Utley, appeared at the hearing on March 8, 1946 to make certain objections on behalf of Charles Brown and on behalf of an alleged creditor in the case. Objection was made that Mr. Cobb had no right to be heard for the reason that his clients were not parties to this involuntary proceeding. I refused to hear Mr. Cobb, as attorney for

the aforesaid alleged creditor, but I ruled he should be heard, nevertheless, since his client, Charles Brown, was entitled to notice of all hearings, under the amended stipulation whereby the \$30,000.00 was deposited with the Clerk.

Mr. Cobb thereupon made these objections:

(1) That the Special Master should not proceed under the aforesaid stipulation without proof that the attorney who signed it on behalf of the alleged bankrupt had authority so to do. Your Special Master overruled this objection. The attorney in question Kyle Z. Grainger, Esq., is admitted to practice in this Court and he appears in this case for the firm of Grainger and Hunt, the attorneys of record for the alleged bankrupt. Under such circumstances the Court should not concern itself with his authority to act unless the question is raised by the alleged bankrupt itself.

(2) That the method of disposing of this case, as proposed by the aforesaid stipulation, did not conform to the order of reference in this matter or to Your Honor's order of December 14, 1945, or to the terms of the amended stipulation under which the \$30,000.00 was deposited with the Clerk. Your Special Master overruled this objection. Your Honor's order directed the Special Master to proceed under the order of reference of July 24, 1945. That order appoints me [151] Special Master to hear the issues raised by the pleadings in this case and gives me full power, as Special Master, "to hear the issues raised by said pleadings, make findings of fact, conclusions of law, and report the same, together with his recommendation to this Court." This is the customary and usual

phraseology used in referring an involuntary bankruptcy petition to a Special Master. Under such an order of reference the Special Master may permit the parties to stipulate as to any or all of the issues raised by the pleadings in the case. Therefore, clearly, the stipulation here in question does not do violence to Your Honor's order of December 14, 1945 or to the order of reference of July 24, 1945. The one question then remains—does the stipulation violate the amended stipulation under which the \$30,000.00 was deposited with the Clerk. With that question, I hold, we are not here concerned. The amended stipulation, just mentioned, did not make Brown a party to the involuntary petition in bankruptcy or entitle him to be heard in opposition thereto. It merely contained certain provisions with respect to the prosecution of the involuntary petition in this case. Such provisions do not deprive this Court of its jurisdiction or power to permit such disposition of the involuntary proceeding as may appear to it to be appropriate in the premises. This Court is not compelled by the amended stipulation, under which the money was deposited with the Clerk, to require the petitioning creditors and the alleged bankrupt to submit to the Court for decision each and all of the issues raised by the pleadings in this case. If the petitioning creditors and the alleged bankrupt, by their stipulation for the disposition of this case, have violated the amended stipulation, under which the money was deposited with the Clerk, Brown may perhaps be entitled to complain elsewhere, but not here.

Having disposed of the aforesaid objections made by Mr. Cobb your Special Master proceeded to the hearing of the issues presented by the aforesaid stipulation. The

only evidence introduced was the [152] transcript of the evidence introduced at the hearing of the Order to Show Cause directed to William Harrah, John Harrah, Charles Brown and E. A. Gerety relative to the ownership of the sprinkling system here involved and the disposition of the sum of \$30,000.00 now held by the Clerk of this Court as a Court of Bankruptcy.

Upon the said evidence your Special Master now makes the following

Findings of Fact

I.

Your Special Master finds that the sprinkler system presently located on the premises of the alleged bankrupt belongs to the alleged bankrupt, free and clear of any claim or lien thereon or thereto.

II.

Your Special Master further finds that the sum of \$22,500.00 of the sum of \$30,000.00 now on deposit with the Clerk of this Court, as a Court of Bankruptcy, belongs to the alleged bankrupt.

III.

Your Special Master further finds, from the foregoing facts already found and pursuant to the stipulation of the parties hereto, that the alleged bankrupt is not insolvent and was not insolvent at the time of the alleged commission of the act of bankruptcy alleged in the First Amended Involuntary Petition herein.

Upon the foregoing Findings of Fact your Special Master now states the following

Conclusions of Law

Your Special Master concludes that the alleged bankrupt did not commit the act of bankruptcy alleged in the First Amended Involuntary Petition herein and that the said petition should be dismissed.

Recommendations

Upon the foregoing Findings of Fact and Conclusions of Law your Special Master respectfully recommends that an order be entered [153] dismissing the First Amended Involuntary Petition herein.

Papers Submitted

I hand up for the information of the Court the following papers:

1. Creditors' Petition, filed October 21, 1944.
2. Notice of Motion to Dismiss Involuntary Petition, filed November 3, 1944.
3. Notice of Change in Date, etc., filed November 15, 1944.
4. Petition for Appointment of Receiver, filed December 19, 1944.
5. Substitution of Attorneys, filed December 29, 1944.
6. Stipulation and Order Approving Same, filed January 5, 1945.
7. Amended Stipulation and Order Approving Same, filed January 9, 1945.
8. Order Setting for Hearing Motion to Dismiss, etc., filed January 17, 1945.

9. Order Denying Petition for Appointment of Receiver, filed January 17, 1945.
10. Order Directing Payment of Money, etc., filed January 17, 1945.
11. Creditors' First Amended Involuntary Petition, filed February 28, 1945.
12. Copy of Answer of Alleged Bankrupt, filed March 13, 1945.
13. Affidavit of Harold B. Pool, filed July 19, 1945.
14. Points and Authorities in Support of Motion to Intervene, filed July 19, 1945.
15. Stipulation, filed July 20, 1945.
16. Order Permitting Bankrupt to File Amended Answer, filed July 20, 1945. [154]
17. Copy of letter from Cobb & Utley to Grainger & Hunt, filed January 17, 1946.
18. Notice of Trial, filed March 4, 1946.
19. Stipulation, filed March 8, 1946.
20. Exhibits 1 and 2, filed pursuant to the above mentioned stipulation, being volumes 1 and 2 of the Reporter's Transcript of Testimony and Proceedings in re Alleged Bankrupt vs. Charles J. Brown, et al.

Note: The following papers were transmitted, on September 12, 1945, with the Referee's Certificate on Petition for Review of Order in re Disposition of Money held by Clerk of Court:

1. Petition in Intervention in Opposition to Amended Involuntary Petition, filed July 19, 1945.

2. Notice of Motion on Petition to Intervene, filed July 19, 1945.
3. Amended Answer of Alleged Bankrupt, filed July 20, 1945.

#### Compensation of Special Master

Your Special Master respectfully suggests that in disposing of this matter provision should be made by Your Honor for the payment of such compensation as Your Honor may find it appropriate and proper to award to the Special Masters in this case for their services in connection with the involuntary proceeding and the \$30,000.00 controversy.

The record shows that on October 23, 1944 an order of general reference was made to Referee Dickson, as Referee; that on June 1, 1945 an order was made assigning the involuntary proceeding to Referee Dickson for hearing, pursuant to a stipulation that the trial of the proceeding might be before the Judge or before one of the Referees of the Court, as Special Master; that on July 23, 1945 [155] Referee Dickson disqualified himself as Special Master; that on July 23, 1945 an order was entered referring the matter to me, as Special Master; that on July 24, 1945 another order was entered referring the involuntary proceeding to me, as Special Master; that on August 13, 1945 Referee Dickson filed a certificate disqualifying himself as Special Master and as Referee; that on August 13, 1945 I filed a certificate that I had heard the \$30,000.00 controversy as Referee; and that on August 13, 1945 an order was entered, *nunc pro tunc* as of July 23, 1945, referring this proceeding to me as Referee.

The compensation of a Referee in Bankruptcy is fixed by section 40 of the Bankruptcy Act and section 72 of the Act provides that no other or further compensation shall be allowed for his services as required by the Act. Section 22 of the Act provides that a reference may be made to a Referee at any stage of a proceeding.

It is believed that a reference ought not to be made to a Referee, as Special Master, if it could be made to him, as Referee.

Except for the \$15.00 filing fee there is no compensation allowable to a Referee under section 40 of the Bankruptcy Act as this case now stands. Therefore, if compensation is to be allowed it must be upon the basis that the services rendered were not required by the Bankruptcy Act. In this connection Your Honor's attention is directed to the fact that the order of June 1, 1945, hereinbefore mentioned, was made pursuant to the stipulation of the parties, and to the further fact that the parties by their amended stipulation, hereinbefore mentioned, placed the \$30,000.00 fund in the custody of this Court and that the controversy over the said fund was brought on for hearing before the Referee by one of the parties to the said amended stipulation.

Your Special Master spent approximately seven days of his time in connection with this involuntary proceeding and the \$30,000.00 [156] controversy and he is authorized to say by Referee Dickson that he spent approximately three days of his time in connection with said matters.

Your Special Master, therefore, respectfully prays that Referee Hugh L. Dickson be allowed the sum of \$150.00

and that your Special Master be allowed the sum of \$350.00 for services rendered in this matter and that Your Honor designate the manner in which and the person or persons by whom the said respective amounts should be paid.

Respectfully submitted this 27th day of March, 1946.

BENNO M. BRINK

Special Master

[Endorsed]: Filed Mar. 27, 1946. [157]

---

[Title of District Court and Cause.]

MOTION TO DISMISS INVOLUNTARY  
PETITION

To Frank Williams, Moses C. Davis, Charles W. Cradick  
and to their attorneys, Nicholas & Davis:

You, and each of you, will please take notice that on  
Tuesday                          14th

Monday, November 13, 1944, at 10 A. M. thereof, the  
Abbot Kinney Company, the respondent herein, will move  
the above entitled court, in the court room of the Honorable

Hugh L. Dickson, Referee  
able J. F. O'Connor, in the Federal Court House and  
Post Office Building, 312 North Spring Street, Los Angeles,  
California, for an order dismissing the Involuntary  
Petition in Bankruptcy filed herein by you against the  
said respondent, the said motion will be made upon the  
following grounds, to-wit:

1. That the said involuntary petition does not state facts sufficient to constitute grounds upon which to base an adjudication in bankruptcy.
2. That the said petition is uncertain in this that it cannot be learned nor ascertained therefrom:
  - (a) Whether or not either of the said petitioners are unsecured creditors.
  - (b) In what amount, if any, the said petitioners are severally unsecured *creditor* of the said respondent.
  - (c) Whether the alleged payment to Charles J. Brown and others was made to secured or unsecured creditors and what amount, if any, was paid to Charles J. Brown and what amount, if any, was [158] paid to the others, and who the others are, and whether or not the said payment did in fact result in a preference.
  - (d) How any interest or money is due on said bonds at the present time.
  - (e) Whether or not the said respondent was insolvent at the alleged date of the alleged payment to Charles J. Brown and others.
3. That said petition is ambiguous in each and every particular in which it is herein alleged to be uncertain.
4. That said petition is unintelligible in each and every particular in which it is herein alleged to be uncertain.

Said motion will be based upon this Notice and Motion together with all the files and records on file herein and upon the grounds set forth herein.

Wherefore said respondent prays that said petition be hence dismissed and for such other relief as is proper in the premises.

HIRAM E. CASEY

HAROLD B. POOL

By Hiram E. Casey

Attorneys for Respondent

I hereby certify that I am one of the attorneys for respondent, and in my opinion, the foregoing motion is well taken in point of law and not filed for delay.

HIRAM E. CASEY

Attorney [159]

#### AUTHORITIES

Burns Bros. v. Cook Coal Co., 46 Fed. 2d 31

In re Morgan, 39 Fed. 2d 489 (15 ABRNS 661)

Sec. 3 Bankruptcy Act, Sub A (3)

Sec. 3 Bankruptcy Act, Sub C

Sec. 4 Bankruptcy Act, Sub 4.

The petition is a pleading and hence all essential facts giving capacity to the parties and jurisdiction to the court and forming the elements of the cause of action must be alleged and their allegation must conform to the usual rules of pleading.

In re Plotke, 104 Fed. 964

To be a creditor to whom a transfer will enable the obtaining of a preferential percentage of his debt over other creditors of the same class, a person must own a demand or claim provable against the bankrupt.

Crafts-Riordan Shoe Co., 26 A. B. R. 449

If any of the petitioning creditors claim is alleged to be a secured claim, the excess of the debt over the security should also be alleged.

In re Triangle, 267 Fed. 300

Section 4 B of the Bankruptcy Act specifically exempts from its application Building & Loan Associations, Municipal, Railroad, Insurance or Banking corporations.

A petition in involuntary bankruptcy held insufficient in that it did not state facts showing either that the defendants were subject to adjudication under the statute or the capacity of petitioners to maintain the petition.

In re: Parker, 283 Fed. 404

Sec. 267 Rem. Bankruptcy, Vol. 1, 4th Edition.

[Endorsed]: Filed Nov. 3, 1944 at 50 min. past 3 o'clock P. M. Hugh L. Dickson, Referee.

[Endorsed]: Filed Mar. 27, 1946. [160]

[Title of District Court and Cause.]

## AMENDED STIPULATION AND ORDER APPROVING SAME

The petitioning creditors in the above-entitled involuntary proceeding in bankruptcy, the alleged bankrupt, and Charles J. Brown, having signed and filed herein a stipulation, approved by the court, concerning the disposition of \$30,000.00 now held by Charles J. Brown, and it appearing that the terms and conditions of the said stipulation should be clarified in order to make plainer the intentions of the parties,

It is hereby agreed that the said stipulation shall be amended to read as follows:

"Whereas, an involuntary petition in bankruptcy has been filed in the above-entitled proceeding in the above-entitled court against the above-named alleged bankrupt and is now pending; and

"Whereas, the petitioning creditors therein have heretofore filed herein a petition for an order requiring the said Charles J. Brown to pay over to the estate of the alleged bankrupt the said sum of \$30,000.00, which the alleged bankrupt contends was unlawfully paid to the said Charles J. Brown out of such estate subsequent to the filing of the said involuntary petition, and an order to show cause thereon has been issued against the said Charles J. Brown, and said petition and order to show

cause are now pending before the above-entitled court; and [161]

"Whereas, the said Charles J. Brown has filed herein a petition for the appointment of a receiver in bankruptcy prior to adjudication, and such petition is now pending before the above-entitled court; and

"Whereas, the above-entitled proceeding has been referred by the court generally for administration by its order to Hugh L. Dickson, a referee in bankruptcy in said court, pursuant to the provisions of Section 22 of the National Bankruptcy Act of 1898, as amended; and

"Whereas, a dispute has arisen between the alleged bankrupt and Charles J. Brown with respect to the cancellation by said alleged bankrupt of certain leases held by the said Charles J. Brown,

"Now, Therefore, It Is Hereby Stipulated and Agreed as Follows:

"1. The said petition of Charles J. Brown for the appointment of a receiver in bankruptcy may be denied without prejudice, and the bond heretofore posted by the said Charles J. Brown, pursuant to the provisions of Section 3-(e) of the said bankruptcy act, shall be exonerated.

"2. The said petition for an order requiring the said Charles J. Brown to pay back the said sum of \$30,000.00, shall be denied, and the said order to show cause issued thereon, shall be discharged, both without prejudice.

"3. The said Charles J. Brown shall pay over to the Clerk of the above-entitled court, as a court of bankruptcy, the said sum of \$30,000.00, to be impounded and held by him, pursuant to the provisions of Sections 851 and 852 of the Judicial Code of the United States, under the following terms and conditions:

"(a) The pending motion by the alleged bankrupt to dismiss the said involuntary petition shall be reset for hearing upon the court calendar at the earliest possible date in February, [162] 1945, but not later than February 16, 1945, and thereafter proceedings to determine the sufficiency of the said involuntary petition, or amendments thereto, shall be prosecuted with due diligence, and all other matters pertaining to the determination of the solvency or insolvency of the alleged bankrupt, and the commission by it of an act, or acts, of bankruptcy, shall likewise be prosecuted with due diligence. Nothing herein contained shall be deemed to prevent the alleged bankrupt from commencing herein a proceeding under Chapters X or XI of the Bankruptcy Act.

"(b) Each of the parties hereto shall be given notice in writing of the time and place of all hearings in the above-entitled proceeding at least five days prior to any such hearing.

"(c) In the event the above-entitled involuntary proceeding is finally dismissed, the said sum of \$30,000.00 shall be returned by the said Clerk to the said Charles J. Brown without deduction of any amount whatever, un-

less, prior to ten days after such final order of dismissal, the alleged bankrupt shall serve upon the parties hereto, and file herein, an application that the said sum of \$30,000.00, or a part thereof, shall be paid over to it, in which event the said sum shall be retained by the said Clerk and disbursed by him to the person or persons whom the above-entitled court shall finally determine is or are entitled thereto after due hearing upon notice to the parties hereto, or, if the said court shall decide that it does not have jurisdiction to determine who is entitled thereto, then, and in that event, the said sum shall be returned by the said Clerk to the said Charles J. Brown without any deduction therefrom whatsoever, without prejudice.

“(d) In the event a final order of adjudication is made in the above-entitled proceeding, or a final order is made approving the commencement of a Chapter X or XI proceeding under the Bankruptcy Act, the said sum of \$30,000.00 shall be paid over [163] the said Clerk to the receiver in bankruptcy, the trustee in bankruptcy, or the debtor-in-possession herein, as the case may be, unless prior to ten days after such final order of adjudication, the said Charles J. Brown shall serve upon the parties hereto, and file herein, an application that the said sum of \$30,000.00., or a part thereof, shall be paid over to him, in which event the said sum shall be retained by the said Clerk and disbursed by him to the person or persons whom the above-entitled court shall finally determine is or are

entitled thereto after due hearing upon notice to the parties hereto.

"(e) Pending the determination by the above-entitled trial court of all the matters above set forth, the alleged bankrupt shall not take any further action whatsoever in the matter of the cancellation of any lease, or purported lease between the alleged bankrupt, as lessor, and Charles J. Brown, as lessee, by reason of any cause now existing, as set forth in notices of cancellation dated December 21, 1944."

Dated: This 8 day of January, 1945.

H. B. POOL & HIRAM E. CASEY

By H. B. Pool

Attorneys for Charles J. Brown

GRAINGER AND HUNT

By Reuben G. Hunt

Attorneys for Alleged Bankrupt

NICHOLAS & DAVIS

By Wm. Howard Nicholas

Attorneys for Petitioning Creditors [164]

### ORDER

Upon consideration of the foregoing amended stipulation It Is Hereby Ordered that the said amended stipulation be and the same is hereby approved.

Dated: This 9th day of January, 1945.

HUGH L. DICKSON

Referee in Bankruptcy

[Endorsed]: Filed Jan. 9, 1945, at 50 Min. past 9 o'clock A. M. Hugh L. Dickson, Referee; Clerk J. B.

[Endorsed]: Filed Mar. 27, 1946. [165]

[Title of District Court and Cause.]

ORDER DIRECTING PAYMENT OF MONEY  
TO THE CLERK OF THE COURT

Pursuant to the Amended Stipulation entered into and filed herein by the petitioning creditors in the above-entitled involuntary proceeding in bankruptcy, the alleged bankrupt, and Chas. J. Brown, which Stipulation has been approved by the Court, and a copy of which is attached hereto and made a part hereof as "Exhibit A",

It Is Hereby Ordered that Chas. J. Brown shall forthwith pay over to the Clerk of the above-entitled Court the sum of \$30,000.00, and that said sum shall be held and impounded by the said Clerk as custodian only, pursuant to the provisions of Sections 851 and 852 of the Judicial Code of the United States.

It Is Hereby Further Ordered that neither the whole nor any part of the said sum of \$30,000.00 shall be disbursed by said Clerk except upon an Order made by the above-entitled Court to one of the parties to the said Stipulation, ~~after hearing upon due notice to each of the said parties,~~ and in the manner provided for in said Stipulation. [H.B.P. R.G.H. M.P.D. W.H.N.]

Dated: This 18th day of January, 1945.

HUGH L. DICKSON

Referee in Bankruptcy

United States of America  
Southern District of California  
Central Division—ss.

I, Hugh L. Dickson, Referee in Bankruptcy in and for the County of Los Angeles, State of California, in and for the said District, do hereby certify that the within instrument is a true and correct copy of the original as the same appears of record in my office.

In Witness Whereof, I have hereunto set my hand this 18th day of January, 1945.

HUGH L. DICKSON  
Referee in Bankruptcy [166]

The foregoing Order is hereby approved this 8th day of January, 1945.

H. B. POOL and HIRAM E. CASEY  
By Howard Pool  
Attorneys for Chas. J. Brown

GRAINGER AND HUNT  
By Reuben G. Hunt  
Attorneys for Alleged Bankrupt

NICHOLAS & DAVIS  
By M. Philip Davis  
Attorneys for Petitioning Creditors

[Endorsed]: Filed Jan. 18, 1945. [167]

[Title of District Court and Cause.]

## POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO INTERVENE

Federal Rule Civil Procedure 24(a) (2)

Collier, 14th Ed. Vol. 2, p. 70

"Under the principles before stated and Federal Rule 24 (a) (2), it seems reasonably clear that where the stockholder can show that the corporate officials have refused and neglected to contest the petition and that this refusal is based not on an exercise of lawful business discretion but on a basis of fraud and abuse of their trust, the stockholder has an absolute right to intervene in the proceedings on behalf of the corporation.

The procedure for intervention in all cases should follow Federal Rule 24 (c), which provides:

'A person desiring to intervene shall serve a motion to intervene upon all parties affected thereby. The motion shall state the ground [168] and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought'."

Remington, Volume 1, pages 385-388

"If, however, the lienholder is a creditor, and a fortiori if he is a creditor to an extent not covered by his security, he may, of course, intervene.

A purchaser of the bankrupt's property which had been sold under an execution, the lien of which had attached within the four months, was held competent to intervene in one case because, if the adjudication of bankruptcy should remain in force and the property be recovered by

the trustee, the purchaser would then become a creditor since he would be the owner of the whole or a part of the demand represented by the judgment to satisfy which the property had been sold. See *Abbott v. Wauchula Mfg. Co.* 36 A. B. R. 310, 229 Fed. 677 (C. C. A. Fla.)"

"*Ogden & Jamison v. Gilt Edge Mines Co.* 34 A. B. R. 893, 225 Fed. 723 (C. C. A. S. Dak.): 'That stockholders of a corporation may, in equity, either sue for or defend on behalf of the corporation, if the directors fraudulently fail to do so, or where they are the beneficiaries of the action, is a well recognized principle of equity jurisprudence. . . . The allegations in the petition for leave to intervene, and the proposed answer made a part thereof, clearly show such a condition of affairs as to justify stockholders to intervene and defend on behalf of the corporation when the directors, charged with the protection of the corporate property, are adversely interested, and not only refuse to defend but confess judgment, as is alleged in the proposed answer, and as is shown by the record to have been done.' " [169]

*Remington* 1701. In order to obtain a preference a creditor receiving payment must be of the same class. If no other creditor of the same class, no preference.

*In re Star Spring Bed Co.* 257 F. 176, 265 F. 133

Creditors eligible to file involuntary petition must "have provable claims fixed as to liability and liquidated as to amount". Section 59, subdivision b, Bankruptcy Act as amended.

Respectfully submitted,

COBB & UTLEY

By Francis B. Cobb

Received copy of the within this 18 day of July, 1945.  
Grainger & Hunt, C., Attorney for Alleged Bankrupt.

Received Jul. 18, 1945. Nicholas & Davis, G. B. H.

[Endorsed]: Filed Jul. 19, 1945, at .....Min. past  
9 o'clock A. M. Hugh L. Dickson, Referee.

[Endorsed]: Filed Mar. 27, 1946. [170]

---

[Title of District Court and Cause.]

### AFFIDAVIT OF HAROLD B. POOL

State of California

County of Los Angeles—ss.

Harold B. pool, being first duly sworn, deposes and says:

That he is a creditor of the above named alleged bankrupt having a provable debt in the amount of \$500.00, that he is one of the attorneys who signed a stipulation on file herein bearing date of January 8, 1945.

That since January 8, 1945, affiant has called on numerous occasions on Grainger & Hunt, requesting that a hearing be had on the amended involuntary petition and on the last call the following occurred:

By affiant: Has the matter of insolvency been set down for hearing?

By Grainger: Set down for the 18th of July.

By affiant: What preparation is being made for trial of the insolvency question? [171]

By Grainger: I have been conferring with Mr. Davis.

By affiant: Any member of the board other than the Davis group can give you the information and it would

seem that you should confer with some one that knows the picture other than with your adversary.

That affiant has not been consulted nor to affiant's knowledge has any member of the board been contacted in respect to the defense.

HAROLD B. POOL

Affiant

Subscribed and sworn to before me this 17th day of July, 1945.

FRANCIS B. COBB

Notary Public in and for the County of Los Angeles,  
State of California

[Endorsed]: Filed Jul. 19, 1945, at ..... Min. past 9  
o'clock A. M. Hugh L. Dickson, Referee.

[Endorsed]: Filed Mar. 27, 1946. [172]

---

[Title of District Court and Cause.]

ORDER PERMITTING BANKRUPT TO FILE  
AMENDED ANSWER

Good cause appearing therefor,

It Is Hereby Ordered that Abbott-Kinney Company, the alleged bankrupt above named, may file herein its Amended Answer of Alleged Bankrupt to the First Amended Involuntary Petition filed herein.

Dated this 20 day of July, 1945.

HUGH L. DICKSON  
Referee in Bankruptcy

[Endorsed]: Filed Jul. 20, 1945, at ..... min. past .....  
o'clock .... M. Hugh L. Dickson, Referee.

[Endorsed]: Filed Mar. 27, 1946. [173]

[Title of District Court and Cause.]

[MEMORANDUM ORDER]

Nicholas & Davis, Los Angeles, California, Attorneys  
for Petitioning Creditors,

Grainger & Hunt, Los Angeles, California, Attorneys  
for Alleged Bankrupt,

O'Connor, J. F. T., Judge.

The report of the Special Master on involuntary petition  
in bankruptcy in the above entitled matter is before  
this court for review.

The Special Master, in his report, recommends against  
an adjudication, which means a denial of the involuntary  
petition.

The findings and recommendations of the Special Master  
on this one issue are approved, and it is the order of  
this court that the involuntary petition be dismissed.

The principal controversy is really a collateral matter:  
the determination of the ownership of the \$30,000. paid  
to Charles J. Brown after the filing of the involuntary  
petition in bankruptcy. The ownership of the said \$30,-  
000 fund was determined by the Referee (not as Special  
Master), and his order in connection therewith is now be-  
fore this court on review. [174]

The alleged bankrupt corporation, Abbot Kinney Company,  
was indebted for the purchase of a certain sprinkler  
contract to F. R. Cruickshank & Company for a large  
sum of money. The creditor offered to accept from the  
corporation ten thousand (\$10,000) dollars in full pay-  
ment of the balance due on the sprinkler contract, and the  
corporation was financially able to make such payment and  
purchase the contract.

John Harrah was a member of the Board of Directors of the alleged bankrupt corporation, and the Executive Committee was composed of John Harrah, Carleton Kenney, and Alfred U. Newton. It is clear that Carleton Kenney was under the domination of John Harrah. E. A. Gerety was the general manager and chief executive officer of the corporation, and Charles J. Brown was a close friend of John Harrah and his son, William Harrah. At the instigation of John Harrah, a conspiracy was entered into between John Harrah, William Harrah, Charles J. Brown, and E. A. Gerety, the object of which was to have the Executive Committee refuse to purchase the sprinkler contract for the sum of ten thousand (\$10,000) dollars and to have Charles J. Brown purchase the same for the conspirators, and thereafter demand from the corporation its payment, and that Charles J. Brown did so purchase the contract for fifteen thousand (\$15,000) dollars. E. A. Gerety and John Harrah, thereafter, told Brown that the corporation had seventy-five hundred (\$7500) dollars cash on hand which would be paid to him upon his demand and said sum was so paid.

John Harrah had, prior thereto, as a member of the Executive Committee and Board of Directors, stated that the contract was of no value and that he would not authorize payment thereon so long as the bonded indebtedness remained unpaid. After the contract was acquired by Brown, John [175] Harrah instructed Carleton Kenney to vote for payment of \$7500 demanded by Brown, and, thereafter, Gerety and John Harrah told Brown that the corporation had \$30,000 on hand and on November

7, 1944 thereafter, the involuntary petition in bankruptcy was filed herein. John Harrah instructed the said Carleton Kenney to vote for such \$30,000 payment, which was thereupon paid to Charles Brown. The written assignment of the contract to Brown was for the benefit of Gerety, John Harrah, William Harrah and Brown.

On November 30, 1944, William Harrah notified the corporation that he had purchased a one-third interest in the unpaid balance of the sprinkler contract on November 25, 1944. Brown and his associates strenuously contended that the court was without jurisdiction, notwithstanding the provisions of the stipulation signed by all of the parties and filed with the court.

The authorities hold that, under the facts in this action, the court has jurisdiction to determine the ownership of the \$30,000.

An involuntary petition in bankruptcy has been filed against a corporation within this jurisdiction by three persons who represent that they are creditors and an act of bankruptcy is alleged. True, they may ultimately be determined to be secured creditors and could not qualify as petitioning creditors. On the other hand, they might show that their alleged security was valueless. They might not be able to support the alleged act of bankruptcy, but, while the proceeding was before the bankruptcy court, the bankruptcy court was a court of competent jurisdiction to determine matters pertaining to the property of the bankrupt, and property found in the pos-

session of the bankrupt. No other court [176] during the pendency of the proceeding could, without the consent of the bankruptcy court, entertain litigation in connection with the property of the alleged bankrupt. (*Isaacs v. Hobbs Tie & Timber Co.*, 282 U. S. 734)

During the pendency of the proceedings, it would be quite possible and proper for persons to appear in this proceeding claiming to own property in the possession of the bankrupt and request that their property be released to them, and should the court upon the said hearing determine that they were not entitled to the return of the property, and it belonged to the bankrupt, such a determination would be *res adjudicata* in any subsequent proceedings.

While the situation is not quite kindred, nevertheless this \$30,000 was in the possession of the alleged bankrupt at the date these proceedings were filed. That date is the line of cleavage, and the fact that it came to Brown's hands and back to the Clerk of the court makes little difference. Let us suppose that the property was in the hands of the alleged bankrupt and some person claimed it, and the debtor by a proceeding during the pendency of the proceeding brought the person so claiming the property before the court—we will say upon a matter not as highly contested as here. Let us assume that the debtor was not sure of its position and was not sure if the debtor or the claimant owned the property, and that the court after a full determination determined that it was the property of

the debtor. That determination would be a final determination binding the parties in the future.

This rule is necessary since the filing of a bankruptcy proceeding, regardless of whether an adjudication is secured or not, throws a blanket of protection upon all *pro-* [177] *property of the alleged bankrupt and particularly property in the possession of the bankrupt whether owned by the bankrupt or not.*

The court could assume or reject the jurisdiction herein exercised. In view of the agreement of the parties, and in view of the spirit and provisions of the Bankruptcy Act, the contested involuntary petition in bankruptcy should have been expeditiously disposed of and every collateral matter deferred, if possible, and relegated to the other courts after the dismissal of the involuntary petition—but we have had a most thorough and complete trial of the controversy. The records show most extensive presentation, examination and cross-examination of witnesses, production of documents, and the Referee's findings are extensive and complete. The record supports the findings of the Referee and it appears that his conclusions of law in the premises are proper and supportable. Therefore, it would not appear, at this stage of the proceedings, to be equitable for the court to exercise its discretion in refusing to entertain the matter which has already been tried, and on which findings have already been made, and direct the parties to enter upon the litigation again in some other court. The conclusion is, therefore,

that the court had jurisdiction and the findings of the Special Master are approved, on this point.

Had the strategy of respondents prevailed, and had they been able to force a hearing on the involuntary petition, instead of the order to show cause proceeding, then it is quite possible that the court would not have entertained at that stage, (and after dismissal of the involuntary petition,) a determination of the ownership of the thirty thousand (\$30,000) dollar fund. The record is so complete on the conspiracy and the various elements thereof, that the respondents could hardly [178] hope to secure a different result in any other court, state or federal.

The report of the Special Master on the involuntary petition in bankruptcy, including findings of fact, conclusions of law and recommendations, is approved by this court, with the following exceptions:

The Referee found that the corporation could have purchased the sprinkler contract for ten thousand (\$10,000) dollars, and, further, that the corporation was able to discharge its obligation and acquire the sprinkler contract, but was prevented from so doing, as stated.

The record clearly supports the position taken by the Referee up to this point, but beyond this point in applying those principles of equity which must be applied here, and in condemning the action of the conspirators, I cannot agree with the Referee's finding that the corporation should suffer through the acts of the conspirators and pay anything more than ten thousand (\$10,000) dollars upon the said contract. The Referee's order in effect is

penalizing the corporation five thousand (\$5,000) dollars in an effort to make whole the conspirators and make full restitution to them. All equities of the case lie in the other direction, and at this point only, the court disagrees with the Referee.

Since the primary element of the conspiracy was to cause the corporation to reject the ten thousand (\$10,000) dollar transaction with the principal, to the end that the conspirators could acquire the contract and make the corporation pay more than the ten thousand (\$10,000) dollars, it would be a partial recognition and sanction of the conspiracy to so provide herein that the corporation in effect pay more than the ten thousand (\$10,000) dollars. [179]

Therefore, the finding and order that seventy-five hundred (\$7500) dollars be repaid, is reversed, and

It Is Ordered:

That there shall be repaid the sum of twenty-five hundred (\$2500) dollars out of the thirty thousand (\$30,000) dollars on deposit, to the parties making the deposit, and the balance shall be paid to the corporation.

Each party shall pay one-half of the costs.

Let Judgment Be Entered Accordingly.

Dated this 27 day of May, 1946, at Los Angeles, Calif.

J. F. T. O'CONNOR

Judge

[Endorsed]: Filed May 27, 1946. [180]

In the District Court of the United States  
Southern District of California  
Central Division

In Bankruptcy No. 43,551 O'C.

In the Matter of ABBOT KINNEY COMPANY a  
corporation, Alleged Bankrupt.

ORDER ON REVIEW FROM THE ORDER OF  
THE REFEREE, DIRECTING CLERK OF THE  
COURT TO PAY MONIES ON DEPOSIT TO  
ABBOT KINNEY COMPANY, ET AL., AND  
DETERMINING TITLE TO SPRINKLING  
SYSTEM

At Los Angeles, California, in said District on the  
27th day of May, 1946, before the Honorable J. F. T.  
O'Connor, Judge presiding;

Whereas, an Involuntary Petition in Bankruptcy was  
filed in the above entitled matter against the alleged bank-  
rupt on October 21, 1944, by certain of its alleged creditors;  
and,

Whereas, issue was joined on a First Amended In-  
voluntary Petition in Bankruptcy filed February 28, 1945,  
and an Amended Answer thereto filed July 20, 1945; and,

Whereas, by an Order duly given and made by this  
court, said matter was referred to the Honorable Hugh  
L. Dickson, one of the Referees in Bankruptcy of this  
court; and,

Whereas, on or about November 8, 1944, two of the  
three members of the "Executive Committee" of the al-  
leged bankrupt paid to one Charles Brown, one of the

petitioners on review herein, \$30,000.00 of the alleged bankrupt's money on a certain "sprinkler contract", upon which the alleged bankrupt was alleged to be then [181] obligated; and,

Whereas, a controversy arose over the payment of said sum of \$30,000.00 and by Stipulation of the parties in interest, the \$30,000.00 was placed in the custody of the Clerk of this court, as a court of bankruptcy; and,

Whereas, on July 7, 1945, upon the petition of the alleged bankrupt, the Hon. Hugh L. Dickson, as Referee in Bankruptcy, issued an Order to Show Cause requiring the petitioners on review and one John Harrah, one of the aforesaid members of the "Executive Committee", to show cause why an Order should not be entered, (1) Adjudging the alleged bankrupt to be the owner of the aforesaid "sprinkler" contract and the sprinkling system covered thereby and decreeing that any interest therein, on the part of any of the respondents in the said order to show cause, was held by them in trust for the alleged bankrupt; and (2) Directing the Clerk of the court to pay to the alleged bankrupt, the sum of \$30,000.00 held by him, as aforesaid, and requiring Brown to return to the alleged bankrupt, the sum of \$7500.00 which had been paid to him, as aforesaid; and,

Whereas, John Harrah, one of the respondents named in the said Order to Show Cause, made an oral disclaimer of any interest in the aforesaid "sprinkler" contract and in the said sum of \$30,000.00; and,

Whereas, the petitioners on review filed written answers to the said Order to Show Cause and the petition upon which it was issued; and,

Whereas, Charles Brown and E. A. Gerety, two of the petitioners on review, filed written objections to the jurisdiction of this court to hear and determine the issues raised by the said Order to Show Cause and the petition upon which it was issued and William Harrah, the remaining petitioner on review orally adopted the said objections to jurisdiction; and,

Whereas, the said Order to Show Cause and the said [182] objections to the jurisdiction of this court came on for hearing before Referee Dickson on July 23, 1945 and the said objections to jurisdiction were overruled by him; and,

Whereas, it was then suggested by one of the counsel in the case that Referee Dickson was disqualified by reason of prejudice to proceed with the matter; and,

Whereas, Referee Dickson promptly stated that he was entirely free of bias and prejudice in the matter but that since the question had been raised, he would, if there was no objection, request the Hon. Benno M. Brink, Referee in Bankruptcy in this court, to proceed with the matter; and,

Whereas, no objection was made and the matter was referred to the Honorable Benno M. Brink, Referee in Bankruptcy, by an Order duly given and made by this court; and,

Whereas, the Order to Show Cause, the petition upon which it was issued and the answers thereto came on for hearing on July 24, 1945, at the hour of 10 o'clock A. M. before the Honorable Benno M. Brink, as Referee in Bankruptcy presiding, in Room 343, Federal Building, Los Angeles, California, Messrs. Grainger & Hunt by

Kyle Grainger, Esq. and Nicholas & Davis by M. Philip Davis, Esq., appearing for the alleged bankrupt; Cobb & Utley by Francis Cobb, Esq., appearing for Charles Brown; B. M. Kitzmiller, Esq., appearing for E. A. Gerety; Leslie L. Heap, Esq., appearing for William Harrah; and John Harrah, Esq., appearing in propria persona, and evidence both oral and documentary having been introduced and the same having been completed on July 27, 1945, and said Benno M. Brink as Referee in Bankruptcy having been fully advised in the premises, signed and filed his formal Findings of Fact and Conclusions of Law and Order in the matter on August 23, 1945; and,

Whereas, Charles Brown, E. A. Gerety and William Harrah filed a Petition for Review of said Order of August 23, 1945, and the Findings of Fact and Conclusions of Law made in respect thereto and [183] said petition for review is now before this court for its consideration and the court being fully advised in the premises:

It Is Hereby Ordered, Adjudged and Decreed that the Findings of Fact, and each of them, of the Honorable Benno M. Brink, Referee in Bankruptcy, signed and filed in this matter on the 23rd day of August, 1945, on the Order to Show Cause directed to the petitioners on review and one John Harrah, excepting only Finding of Fact XXXII, shall be and the same are hereby confirmed and are incorporated by reference as a part of this order to the same extent and with the same force and effect as if said Findings of Fact and each of them, were here set forth in full, and they and each thereof as so incorporated herein, are hereby adopted as the Findings of Fact of this court in this proceeding.

It is Further Ordered that Finding of Fact XXXII of said Hon. Benno M. Brink, Referee in Bankruptcy, shall be and is hereby rejected, reversed and modified by this court and the following Finding of Fact is made in lieu and in place thereof, to wit:

“XXXII.

It is true that Abbot Kinney Company, the alleged bankrupt, is entitled to receive \$27,500. of said money now on deposit with the Clerk of the above entitled court as a court of bankruptcy, and said Charles Brown and E. A. Gerety are entitled to receive the remaining \$2500. thereof.”

It Is Further Ordered that the Conclusions of Law, and each of them, of the Hon. Benno M. Brink, Referee in Bankruptcy, signed and filed in this matter on the 23rd day of August, 1945 on the Order to Show Cause directed to the petitioners on review and one John Harragh, excepting only Conclusions of Law V and VI, shall be and the same are hereby confirmed and are incorporated by reference as a part of this order to the same extent and with the same force and effect as if said Conclusions of Law and each thereof, were here set forth in full, and they and each thereof as [184] so incorporated herein, are hereby adopted as the Conclusions of Law of this court in this proceeding.

It Is Further Ordered that Conclusions of Law V and VI, respectively, of said Hon. Benno M. Brink, Referee in Bankruptcy, shall be and are hereby rejected, reversed

and modified by this court and the following Conclusions of Law are made in lieu and in place thereof, to wit:

“V.

That Abbot Kinney Company, the alleged bankrupt, is entitled to receive \$27,500. of said money now on deposit with the Clerk of the above entitled court, as a court of bankruptcy.

VI.

That Charles Brown and E. A. Gerety are entitled to receive \$2500. of said money now on deposit with the Clerk of the above entitled court, as a court of bankruptcy.”

It Is Further Ordered that the “Order Directing Clerk of the Court to Pay Monies on Deposit to Abbot Kinney Company, et al., and Determining Title to Sprinkling System” of the Hon. Benno M. Brink, Referee in Bankruptcy, signed and filed in this matter on the 23rd day of August, 1945 on the Order to Show Cause directed to the petitioners on review and one John Harrah, excepting those portions thereof which are hereinafter reversed, shall be and the same and each and every part thereof is hereby confirmed.

It Is Further Ordered that Abbot Kinney Company, the alleged bankrupt, is the owner of that certain sprinkling system installed by F. R. Cruickshank & Company on the property of Abbot Kinney Company, the alleged bankrupt, at Venice, Los Angeles, California, pursuant to that certain conditional sales contract entered into by and between F. R. Cruickshank & Company and Abbot Kinney

Company on or about June 2, 1931, free and clear of said conditional sales contract. [185]

It Is Further Ordered that neither E. A. Gerety, Charles Brown, John Harrah nor William Harrah has any right to collect any money on account of said conditional sales contract or to exercise any rights or to enforce any obligations thereunder as against Abbot Kinney Company, the alleged bankrupt; and,

It Is Further ordered that that portion of the "Order Directing Clerk of the Court to Pay Monies on Deposit to Abbot Kinney Company, et al., and Determining Title to Sprinkling System" of the Hon. Benno M. Brink, Referee in Bankruptcy, signed and filed in this matter on the 23rd day of August, 1945 on the Order to Show Cause directed to the petitioners on review and one John Harrah, which orders the sum of \$22,500. of the \$30,000. now on deposit with the Clerk of this court, as a court of bankruptcy, to be turned over and delivered to Abbot Kinney Company, the alleged bankrupt, and which orders the sum of \$7500. of the \$30,000. now on deposit with the Clerk of this court, as a court of bankruptcy, to be turned over and delivered to Charles Brown, shall be and are hereby reversed.

It Is Further Ordered that the Clerk of this court, as a court of bankruptcy, forthwith turn over and deliver to Abbot Kinney Company, the alleged bankrupt, \$27,500. of the \$30,000. now on deposit with said Clerk in this matter.

It Is Further Ordered that the Clerk of this court, as a court of bankruptcy, forthwith turn over and deliver \$2500. of the \$30,000. now on deposit with said Clerk in this matter.

It Is Further Ordered that neither E. A. Gerety, William Harrah, Charles Brown nor John Harrah were qualified under the Bankruptcy Act, on behalf of Abbot Kinney Company, the alleged bankrupt, or at all, to defend against the Involuntary Petition in Bankruptcy filed herein, or to raise any issue regarding the sufficiency of the original or amended Involuntary Petition in Bankruptcy filed herein; [186]

It is Further Ordered that this Court has jurisdiction to hear and determine all of the issues raised by the Order to Show Cause above referred to and the Answers of respondents filed thereto.

It Is Further Ordered that petitioners on review shall pay one-half of the costs herein and that the alleged bankrupt shall pay one-half of the costs herein, which costs shall be and are hereby fixed at the sum of \$..... The Clerk is ordered to deduct the said costs as allowed herein from the respective funds.

J. F. T. O'CONNOR

Judge of the District Court

Judgment entered Jun. 17, 1946. Docketed Jun. 18, 1946. Book COB 38, page 735. Edmund L. Smith, Clerk; by Francis E. Cross, Deputy.

[Endorsed]: Filed Jun. 17, 1946. [187]

[Title of District Court and Cause.]

### NOTICE OF APPEAL

To the Honorable J. F. T. O'Connor, Judge of the United States District Court:

To Abbot Kinney Company and their attorneys of record, Grainger & Hunt:

E. A. Gerety, William Harrah, Charles Brown and Harold Pool, feeling aggrieved by a decree and order entered in the above-entitled proceeding under date of June 17, 1946, and entitled "Order on Review from the Order of the Referee, Directing Clerk of the Court to Pay Monies on Deposit to Abbot Kinney Company, et al., and Determining Title to Sprinkling System," which order has been filed and entered in Civil Order Book 38, page 735, under date of June 17th, 1946, and docketed on June 18th, 1946, do hereby appeal from the whole and each part of said Order of June 17, 1946, to the United States Circuit Court of Appeals for the Ninth Circuit pursuant to Section 24(a) of the Bankruptcy Act as amended, and pursuant to Federal Rules of Civil Procedure, Section 75(g) and General Order 36 in Bankruptcy.

Your petitioners pray that the proper record on appeal as provided under Federal Rule 75(g) of the Federal Rules of Civil [195] Procedure be docketed and that this appeal be heard and determined as provided by law.

Dated this 25th day of June, 1946.

LESLIE L. HEAP  
D. M. KITZMILLER  
COBB & UTLEY

By Francis B. Cobb

[Endorsed]: Filed & mailed copy to Grainger & Hunt  
Jun. 26, 1946. [196]

[Title of District Court and Cause.]

## CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 206 inclusive contain full, true and correct copies of Creditors' Petition; Creditors' First Amended Involuntary Petition; Answer of Alleged Bankrupt; Referee's Certificate on Petition for Review of Order in re Disposition of Money Held by Clerk of Court; Petition for Order to Show Cause; Order to Show Cause; Answer of Charles Brown to Petition and Order to Show Cause; Answer of E. A. Gerety to Petition and Order to Show Cause; Answer of William Harrah to Petition for Order to Show Cause; Objection of Charles Brown to Jurisdiction of this Court in re Order to Show Cause; Objection of E. A. Gerety to Jurisdiction of this Court in re Order to Show Cause; Petition for Review of Referee's Order; Bankrupt's Exhibits 1 to 8 inclusive; Brown's Exhibits 1 to 4 inclusive; Gerety's Exhibit 1; Petition in Intervention in Opposition to Amended Involuntary Petition; Notice of Motion on Petition to Intervene; Amended Answer of Alleged Bankrupt; Order of District Judge dated December 14, 1945; Motion for Dismissal and Notice of Hearing Thereon; Affidavit in Support of Motion to Dismiss; Report of Special Master on Involuntary Petition in Bankruptcy; Motion to Dismiss Involuntary Petition; Amended Stipulation and Order Approving Same; Cer-

tified Copy of Order Directing Payment of Money to the Clerk of the Court; Points and Authorities in Support of Motion to Intervene; Affidavit of Harold B. Pool; Order Permitting Bankrupt to File Amended Answer; Order of District Judge dated May 27, 1946; Order on Review from the Order of the Referee Directing Clerk of the Court to Pay Monies on Deposit to Abbot Kinney Company, et al. and Determining Title to Sprinkling System; Petition for Order Fixing Supersedeas Bond on Appeal; Order Fixing Cost and Supersedeas Bond; Supersedeas Bond on Appeal; Notice of Appeal; Designation of Record on Appeal; Stipulation and Order Extending Time within which to serve and file Designation of Additional Portions of Record on Appeal; Stipulation and Order re Record on Appeal and Appellants' Statement of Points on which they intend to rely on appeal which, together with original Reporter's Transcript of Hearings on July 24, 1945 to July 27, 1945, both inclusive, transmitted herewith, constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing, comparing, correcting and certifying the foregoing record amount to \$51.90 which sum has been paid to me by appellants.

Witness my hand and the seal of said District Court this 26 day of July, A. D. 1946.

(Seal)

EDMUND L. SMITH,

Clerk,

By Theodore Hocke,  
Chief Deputy Clerk.

[Title of District Court and Cause.]

Before Hon. Benno M. Bring, Referee in Bankruptcy  
In Bankruptcy, No. 43551—O'C.

REPORTER'S TRANSCRIPT OF TESTIMONY  
AND PROCEEDINGS IN RE ALLEGED BANK-  
RUPT VERSUS CHARLES J. BROWN, E. A.  
GERETY, WILLIAM HARRAH AND JOHN  
HARRAH

Appearances:

For Petitioning Creditors: Nicholas and Davis, by  
M. Philip Davis, Esq., 812 Banks-Huntley Building, 634  
South Spring Street, Los Angeles, California.

For Alleged Bankrupt: Grainger & Hunt, by Kyle Z.  
Grainger, Esq., 830 H. W. Hellman Building, 354 South  
Spring Street, Los Angeles, California.

For Charles J. Brown: Francis B. Cobb, Esq., 506  
L. A. Stock Exchange Office Building, 639 South Spring  
Street, Los Angeles, California.

For Certain Creditors: Harold B. Pool, Esq., 810  
South Spring Street, Los Angeles, California.

For E. A. Gerety: Don M. Kitzmiller, Esq., 610  
Rowan Building, 458 South Spring Street, Los Angeles,  
California.

For William Harrah: Leslie L. Heap, Esq., and O. S.  
Vernon, Esq., 829 Citizens National Bank Building, 453  
South Spring Street, Los Angeles, California.

Los Angeles, California. Tuesday, July 24, 1945.  
10:00 O'Clock A. M. Session

The Referee: The Abbot Kinney Company?

Mr. Cobb: Ready for part of the group.

The Referee: Be seated. Some one wanted to get away?

Mr. Kinney: Yes, your Honor.

The Referee: In what capacity are you here, Mr. Kinney?

Mr. Kinney: As a witness.

The Referee: Who subpoenaed him?

Mr. Cobb: Mr. Grainger or Mr. Davis.

The Referee: I am sorry, I cannot excuse you until they arrive.

Mr. Cobb, you represent Mr. Charles Brown?

Mr. Cobb: Yes, your Honor, and also represent a creditor and stockholder and bondholder in connection with the motion to intervene.

The Referee: Is that before me?

Mr. Cobb: The motion was made yesterday, and Referee Dickson denied it. I am going to renew it this morning.

The Referee: Who represents Mr. Gerety?

Mr. Kitzmiller: Don Kitzmiller, your Honor.

The Referee: Mr. William Harrah?

Mr. Heap. I do, your Honor, Leslie L. Heap.

The Referee: John Harrah?

Mr. John Harrah: I don't care to be represented at all. [3\*] I know no reason for being. I have no interest in it. I am subpoenaed here as a witness.

\*Page number appearing at top of page of original Reporter's Transcript.

The Referee: Let us see what relief they ask against you. You understand what this matter is about, do you not, Mr. Harrah?

Mr. Harrah: Certainly, I understand.

The Referee: Do you claim any interest in this sprinkling system? Mr. John Harrah: None.

Mr. Cobb: Mr. Harrah is an attorney, your Honor.

The Referee: Yes.

Let us see, you are John Harrah?

Mr. John Harrah: Yes.

The Referee: And you now in open court disclaim any interest in this sprinkling system, Mr. Harrah?

Mr. Harrah: That's right. I never had any interest in it.

The Referee: Do you claim any interest whatsoever in this sum of \$30,000?

Mr. John Harrah: None whatever.

The Referee: Or in the \$7,500? I don't know whether that is going to be involved or not.

Mr. John Harrah: None whatever.

The Referee: Apparently we have to wait for Mr. Grainger. Is Mr. Davis coming? Does anybody know?

Mr. Cobb: They will probably come together. I wonder if [4] your Honor could read the petition for intervention and the motion in connection with the same, the points and authorities attached?

The Referee: All right, I will read it while we are waiting.

(A short recess.)

The Referee: Mr. Kinney has asked to be excused, gentlemen. Is there any objection?

Mr. Davis: I assume there will not be any objection if he is to be back here in an hour.

The Referee: Any objection?

Mr. Grainger: No. Your Honor, we asked the secretary in charge of your Honor's office to phone down, which I presume she did, explaining our delay in endeavoring to get these various orders in connection with the proceeding. Judge O'Connor signed an order referring to you as Master on the issues on the involuntary proceeding, and I understand that the Court will take care of the other end of the—

The Referee: Very well. All right, what matter do you want to take up first, gentlemen?

Mr. Davis: If your Honor please, the matter presently assigned for the purposes of hearing is the order to show cause.

The Referee: Yes?

Mr. Davis: I think that is the orderly procedure. We had arrived at that point yesterday. The other problems had been [5] thoroughly considered by Referee Dickson, and I assume we should go ahead with that phase of it.

The Referee: All right.

Mr. Cobb: At this time I would like to renew the objection that has been made in the form of a written objection and copy served on counsel to the jurisdiction of the Court to proceed on the order to show cause. And I likewise want to urge the motion to intervene. The question of jurisdiction, as your Honor well knows, can be raised at any time. And it goes to the heart of the whole proceeding here. It is based on the four grounds set up in the written objections. The first one, which I think is the fatal defect in the involuntary petition—

Mr. Grainger: May I interrupt here? I see that they are starting to argue those points on that. I think we first ought to clear the brush away as to whether the Court is going to proceed to rehear that which has been decided, in effect accomplishing a review without a review.

The Referee: All right, state your motion, please, Mr. Cobb; then we will see whether we will hear any argument on it. What is your motion, and on whose behalf do you make the motion?

Mr. Cobb: On behalf of a bondholder—and unfortunately my file has not arrived yet; I had to be in another court at 9:15, and it is on its way up—Mr. Pool, a creditor; Mr. Kinney, a stockholder. [6]

The Referee: Which Kinney?

Mr. Cobb: Carleton Kinney, that just left.

The Referee: Yes?

Mr. Cobb: And Mr. John Harrah, as a bondholder.

Mr. John Harrah: Director.

The Referee: Director? All right.

Mr. Cobb: This motion is made to intervene on the facts set up in the petition, which is there is no answer, affidavit, in objection—

The Referee: What is your motion?

Mr. Cobb: On the ground that the—

The Referee: What is your motion? What do you move?

Mr. Cobb: I move that we be allowed to intervene and oppose the involuntary petition and to set up the answer to the involuntary petition which is attached to the pleadings.

The Referee: Upon what grounds do you make the motion?

Mr. Cobb: On the ground that the corporation is not represented by a disinterested group; that Mr. Davis, the attorney for the petitioning creditor, is secretary, and his brother, who is an attorney, is the president and they have filed the answer on behalf of the company and at the same time are attorneys of record pressing an involuntary petition; and that the corporation has not been brought on for hearing and the original answer did not set up all of the defenses that should be set up to the involuntary petition. Mr. Grainger, since I filed this motion, has filed an amended [7] answer which I think sets up the defenses that we ask to be set up. But the—

The Referee: Let us not argue it. I just want your questions. Is this the same motion on which the notice of motion on a petition to intervene was filed July 19, 1945?

Mr. Cobb: Yes.

The Referee: It was set for hearing Monday, July 23, 1945, at 10 a.m. before Referee Dickson. Was it ruled on?      Mr. Cobb: Yes.

The Referee: Your motion is denied. Is there any other motion?

Mr. Cobb: I have the objection to the jurisdiction of this Court to proceed on the order to show cause.

The Referee: You filed that in writing, did you?

Mr. Cobb: Yes, your Honor.

The Referee: Whom do you represent in this capacity?

Mr. Cobb: I represent Mr. Brown, your Honor.

Mr. Kitzmiller: Same objection on behalf of Mr. Gerety.

The Referee: The matter of the objection to the jurisdiction of this Court to proceed on the order to show cause, has that been ruled on?

Mr. Cobb: Yes, it was ruled on, your Honor.

The Referee: What was the ruling, sustained or overruled?

Mr. Grainger: It was overruled and directed to go to trial.

The Referee: The renewal of your objection, then, is [8] likewise overruled.

Mr. Cobb: I want to make it; I want to continue to make it. In other words, if this matter has to go up on a review, I don't want to be confronted with the task of taking a review from Referee Dickson's ruling down there and on the ruling just now denied. In other words, this is not a renewal; it is a continuing objection.

Mr. Kitzmiller: On behalf of Mr. E. A. Gerety I also make the same objection as to the jurisdiction of this Court.

The Referee: You also filed yours on July 23, 1945?

Mr. Kitzmiller: Yes.

The Referee: Was it ruled on?

Mr. Kitzmiller: It was ruled on, your Honor.

The Referee: Was it overruled?

Mr. Kitzmiller: Yes.

The Referee: Your renewed objection is likewise overruled. Is there any other motion?

Mr. Heap: I want to object to the jurisdiction of the Court on behalf of William Harrah. I do not find a written objection. As I explained, I came into this matter yesterday and am not thoroughly familiar with it yet.

The Referee: State your grounds of objection.

Mr. Heap: The grounds of the objection are that the corporation has not been adjudicated to be insolvent nor has it been found to be bankrupt. That is a matter which is set, as I understand, for tomorrow or the next day. And the [9] pleadings before the Court would indicate there is a serious question as to the insolvency of the corporation. I take the position that the insolvency should be first adjudicated; otherwise we are wasting the time of this Court. If tomorrow or the next day it should be found that the corporation is not insolvent and not bankrupt, then this matter should not be tried in the bankruptcy court.

The Referee: I understand that those are the same grounds of objection urged by Mr. Cobb in his objection to the jurisdiction?      Mr. Heap: Yes, sir.

The Referee: And those were specifically ruled on by Referee Dickson?

Mr. Cobb: I further objected, your Honor, that there wasn't any receiver and that the debtor is not permitted to bring on an order to show cause to try title or quiet title, and on the further ground that there was a stipulation that this controversy be postponed until there was a consideration of—

The Referee: The rulings of Referee Dickson will stand. Is there anything else by way of preliminary?

(No answer.)

Now we have before us the petition filed in this matter on July 7, 1945, by the alleged bankrupt, the order to show cause against Charles Brown, E. A. Gerety, William Harrah, and John Harrah, with respect to the ownership of a certain [10] sprinkling system. Mr. John Harrah

is present in open court in propria persona, and he has in the record disclaimed any interest in the sprinkling system or in the sum of \$30,000 which is mentioned in this petition or in the sum of \$7,500 which is also mentioned—if that item should be a part of the subject matter of this litigation.

Is that correct, Mr. John Harrah?

Mr. John Harrah: That is correct, your Honor.

The Referee: The other respondents are all represented by counsel, and the alleged bankrupt is represented by counsel. Let us see, gentlemen, what matters, if any, are either admitted by the pleadings or may be stipulated to. Will you please take your copies of the petition and we will go down it paragraph by paragraph as quickly as we can and see what issues remain.

May it be stipulated that the allegations of paragraph I on page 1 are correct? You do not have a copy, Mr. Cobb?      Mr. Cobb: No, your Honor.

The Referee: Will you sit down with some one else? Make yourselves comfortable now. Are you all ready, gentlemen? It is stipulated that the allegations of paragraph I on page 1 are true?

Mr. Cobb: No, your Honor, we object to that portion of the paragraph that says that an involuntary petition in bankruptcy has been filed. We claim that it does not constitute an involuntary petition because there are no creditors— [11]

The Referee: Do you stipulate that on October 21, 1944, a petition was filed?

Mr. Cobb: Yes, your Honor.

The Referee: Does any one else have an objection to that paragraph?

Mr. Kitzmiller: The same objection with regard to the involuntary—

The Referee: That is a matter of construction as to whether or not it is in fact a petition in involuntary bankruptcy. But you do stipulate that a paper captioned "Involuntary Petition in Bankruptcy" was filed in this matter? Is that correct?

Mr. Kitzmiller: Correct.

The Referee: It is stipulated the allegations in paragraph II are correct? Mr. Cobb: Yes.

Mr. Davis: Yes.

Mr. Kitzmiller: Yes.

The Referee: It is stipulated that the allegations of paragraph III are correct?

Mr. Davis: Yes.

Mr. Cobb: Yes.

Mr. Heap: Except as to the price alleged there. I understand that is not correct. They allege \$400,000.

The Referee: What do you say it is?

Mr. Heap: I am informed it is a little in excess of [12] \$200,000.

The Referee: Do you have the contract, gentlemen?

Mr. Heap: I do not.

Mr. Davis: Mr. Mapes, do you have the original contracts or the modified—

The Referee: Who has it?

Mr. Davis: I guess the Company has it, one copy; and does Mr. Brown have his copy?

The Referee: Why don't we put it, the contract, in evidence, gentlemen? Have you any true copies here, anybody? Mr. Cobb: I will have in a minute.

The Referee: Paragraph IV, Will it be stipulated that Charles Brown, E. A. Gerety, and William Harrah claim to hold and own the seller's interest in said sprinkling system?

Mr. Cobb: It will be so stipulated.

The Referee: The remaining allegation, of course, of that paragraph cannot be stipulated to. That is the controversial point here, that the said claim is without foundation.

Is it stipulated that the allegations of paragraph V are correct, that John Harrah has been a director of said Abbot Kinney Company ever since the 23rd day of December, 1937? Mr. Cobb: Yes.

Mr. Grainger: Yes.

Mr. Heap: Yes.

Mr. Kitzmiller: Yes.

The Referee: Is it stipulated that the allegations of [13] paragraph VI are correct, that E. A. Gerety was an employee of Abbot Kinney Company for many years and from 1937 to December 13, 1944, was its general manager?

Mr. Davis: I think, your Honor, Mr. Gerety has been general manager for substantially longer than that, and that he was a receiver under State court proceedings prior to that time from 1932 to 1937.

Is that right, Mr. Gerety? I think we had better develop that on testimony—

The Referee: All right. Are the allegations of paragraph VII agreed to?

Mr. Cobb: Well, we deny that Charles Brown is associated with John Harrah and William Harrah as a business associate.

The Referee: All right, we will place that paragraph in issue, then.

What about paragraph VIII?

Mr. Cobb: We admit that.

Mr. Kitzmiller: We admit that.

The Referee: Is there any objection to that paragraph on the part of anybody?

Mr. Davis: I think Mr. John Harrah will state that he did not become a member of the Executive Committee until about 1940.

Isn't that correct, Mr. Harrah?

Mr. John Harrah: I don't remember the exact dates.

Mr. Davis: This states that on the 6th day of April, 1938, by action of the Board of Directors of said corporation [14] an Executive Committee was created to be composed of three members. That from the 16th day of November, 1938, until the 13th day of November, 1944, the members of said Executive Committee were John Harrah, Carleton Kinney, and Alfred Newton.

Mr. John Harrah: I think about five years—four years.

Mr. Davis: That is substantially correct, and for all the purposes of this proceeding it is unimportant. We can stipulate that after 1940—

The Referee: What about the allegations of paragraph IX?

Mr. Kitzmiller: Those allegations are denied by Mr. Gerety on—

The Referee: All right.

Mr. Davis: They were admitted by Mr. Harrah and Brown under the 21-A. I think the Court is interested in the stipulation. I believe the facts show that he definite-

ly was and he so admits. If you want to put it in issue, I don't care.

Mr. Kitzmiller: I was not here in the other proceeding. If there was such an admission—

Mr. Cobb: There isn't any doubt that he was agent and attorney for his son.

The Referee: Put it in issue. Now paragraph X? Is it stipulated that during January, 1943, said F. F. Cruickshank offered to accept the sum of \$10,000 in full settlement upon its contract? [15]

Mr. Cobb: No, your Honor. There were some negotiations, but we cannot stipulate—

The Referee: All right, we will have to put the whole paragraph—wait a minute: Is it stipulated that in May, 1944, that Cruickshank offered to accept \$10,000 in full settlement upon its contract?

Mr. Cobb: No, it is not, your Honor.

Mr. Kitzmiller: No. It is stipulated there was the sum of \$137,000 owing.

The Referee: That is a small matter. We will put the whole paragraph in issue.

Mr. Cobb: There are two paragraphs in X, notice, your Honor.

The Referee: There are two X's?

Mr. Cobb: Yes.

The Referee: All right, the first paragraph X is in issue.

Relating to the second paragraph X, on page 4, is it stipulated that Charles Brown claims to have purchased the contract for the sum of \$15,000?

Mr. Cobb: Charles Brown and Mr. Gerety purchased it together. The legal title was taken in the name of Charles Brown.

The Referee: All right, we had better leave that in issue, then. Is it stipulated that on November 25, 1944, the bankrupt received a letter from William Harrah in which he [16] stated he had purchased a one-third interest in the contract?

Mr. Cobb: I think that is correct. I have not seen the letter, but—

The Referee: All right. We will put the letter in evidence.

Is it stipulated that on the 7th of June, 1944, at a meeting of the Executive Committee at which John Harrah and Carleton Kinney were present and Alfred Newton was absent, it was ordered that \$7,500 be paid by the corporation on the contract of Charles Brown and was so paid?      Mr. Cobb: So stipulated.

Mr. Davis: So stipulated.

Mr. Kitzmiller: I will—

The Referee: Is it so stipulated, Mr. Heap?

Mr. Heap: I hesitate to stipulate to that, your Honor, on the part of William Harrah for the reason that I don't know what the fact is. These other gentlemen do, but I don't know.

The Referee: I am sorry, counsel, but this is a court of expedience; and you should acquaint yourself with the facts of the case before you attempt to appear for anybody.

Mr. Heap. My client was served by mail in Reno, Nevada, just a few days ago. I am not going to take up any of the time of the Court on the point. I will co-

operate. I will find out from the gentlemen here on that point, and I can assure you that I am not going to waste any of your time. [17]

The Referee: Is it stipulated that on the 7th day of November, 1944, at a meeting of the Executive Committee, at which meeting Carleton Kinney and John Harrah were present and Alfred Newton was absent, it was directed that the sum of \$30,000 be paid to Charles Brown on the sprinkling system contract and that the said sum was paid?

Mr. Kitzmiller: Yes, except that there was a credit of \$50,000 to be received by the corporation in connection with the \$30,000 payment.

The Referee: Well, we had better leave that open, then.

I suppose paragraph XI will be in issue as well as paragraph XII and likewise paragraph XIII and also paragraph XIV?

Mr. Kitzmiller: That was XIII instead of XV, was it not, your Honor?

The Referee: Did I say XV?

Mr. Kitzmiller: I thought so.

The Referee: Well, XI, XII, XIII, XIV will be controversial.

Paragraph XV, is that stipulated to?

Mr. Cobb: Yes.

Mr. Kitzmiller: Yes.

Mr. Heap: Yes.

The Referee: I guess that is about all you can stipulate to.

All right, gentlemen, please proceed with the evidence; and do not offer any evidence on any of the matters

agreed to, [18] except that I do believe it would be advisable to have a true copy of the Cruickshank contract in evidence.

Mr. Davis: I assume this is an exact copy, your Honor. I have not had a chance to examine it. But we could introduce it—

The Referee: Put it in evidence subject to correction, if necessary.

Mr. Davis: There are three instruments, your Honor.

The Referee: You offer it as one exhibit?

Mr. Davis: It is offered as one exhibit.

The Referee: It will be marked Bankrupt's Exhibit 1.

Mr. Davis: I might state in the absence of Mr. Grainger, your Honor, that although I am representing the petitioning creditors and Mr. Grainger is representing the alleged bankrupt, the petitioning creditors and the alleged bankrupt in this matter are joining to bring this money back into the corporation, and that I have been especially associated in this proceeding with the alleged bankrupt as counsel with Grainger and Hunt for the bankrupt—

The Referee: All right.

Mr. Davis: —and will help carry the proceedings forward. I am wondering if your Honor would care for a statement of the position of the alleged bankrupt and the petitioning creditors in this matter or if you feel that the petition itself—

The Referee: I have read the petition, and I think that [19] sets forth the issues and the substance.

Mr. Davis: Thank you, your Honor. We will call Mr. Charles Brown.

CHARLES J. BROWN,

called as a witness on behalf of the petitioning creditors, being first duly sworn, testified as follows:

The Referee: Is your name Charles Brown?

Mr. Brown: Yes, sir.

The Referee: And you are the Charles Brown who is named in this case? Mr. Brown: I am.

The Referee: Proceed, Mr. Davis.

Direct Examination.

By Mr. Davis:

Q. Where do you reside, Mr. Brown?

A. In Venice.

Q. How long have you resided in Venice?

A. Since 1919.

Q. Are you acquainted with John Harrah?

A. I am.

Q. How long have you known John Harrah?

A. Oh, about twenty odd years.

Q. Have you ever been in business with John Harrah?

A. No, I haven't. [20]

Q. Have you ever been in business with William Harrah? A. No, I haven't.

Q. How well have you known John Harrah?

A. I should say very intimately.

Q. How well have you known William Harrah?

A. Well, I have known William Harrah ever since he has been a young boy growing up.

Q. Who is William Harrah?

A. The son of John Harrah.

Q. Do you know what business William Harrah is in?

A. Presently engaged in business in Reno, Nevada.

(Testimony of Charles J. Brown)

Q. Was he engaged in business at the Venice Pier to your knowledge?

A. Some time in the past he had been.

Q. And who is John Harrah in relation to William Harrah, so far as business is concerned, if you know?

A. Why, I think John Harrah kind of supervised William Harrah.

Mr. Heap: Just a minute. I object to that and move that the answer be stricken as being purely a conclusion.

The Referee: Motion granted. It may go out.

Mr. Davis: Q. Whenever you have had any dealings with William Harrah, whom have you contacted to carry out that business in Venice?

A. Well, I contacted William Harrah.

Q. Have you contacted John Harrah in regard to it? [21]

A. He evidently either advised Mr. William Harrah what to do or how to do it, one thing and another.

Q. You have been referred to John Harrah by William Harrah? A. I have.

Q. To carry on William Harrah's business in Venice?

A. No, just in regard to any deal we had between William Harrah and myself.

Q. And you always referred those matters to John Harrah? A. No, to William.

Q. When William Harrah referred you to John Harrah in connection with any business deal, what did he state to you?

A. I guess that was the conclusion I come to.

(Testimony of Charles J. Brown)

Q. And how long to your knowledge has John Harrah been so representing William Harrah in the Venice activities?

A. As long as William Harrah conducted games of any sort in Venice, John Harrah, being the best man posted on the operation of those games, he naturally sought his father's advice on how to conduct those games.

Q. Now have you ever done any work for William Harrah? A. Yes, I have.

Q. What has that work consisted of?

A. Well, I worked different times for William Harrah.

Q. When did you first start doing work for William Harrah?

A. Well, I don't remember just exactly.

Q. It has been over a period of many years, has it not? [22]

A. Different times I have done work for him.

Q. And you and Mr. William Harrah have been very close in various business activities, have you not?

A. Most of the time as I was an employee of William Harrah, different times.

Q. What was your first employment with William Harrah? A. I really don't remember.

Q. Well, how long ago would you say that first employment took place?

A. Oh, I can't say; quite a few years ago.

Q. Ten or fifteen years ago?

A. Oh, I don't know that it was that long. I can't just exactly say. I think—I think—oh, maybe ten years ago. I couldn't just exactly say.

(Testimony of Charles J. Brown)

Q. And has that employment continued rather regularly down to the present time? A. No, it hasn't.

Q. Are you doing some work for William Harrah at the present moment? A. I am not.

Q. When would you say was the last work you did for William Harrah?

A. Oh, I can't just remember. It was quite some time ago. When you asked me that there—I did work in a liquor store for a few hours a day.

Q. Oh, yes. When was that? [23]

A. That was—that was last—oh, a year or so ago.

Q. Was that last year, 1944?

A. That was up to the time he sold out that liquor store. I only worked a few hours relief.

Q. And what did you do there in the liquor store?

A. What did I do?

Q. Yes.

A. Well, I usually opened it up and received merchandise.

Q. Would you collect the moneys at night or would that be collected by Mr. John Harrah?

A. It would be collected by Mr. John Harrah.

Q. Then did you purchase the inventory for the liquor store?

A. No, I received most of the merchandise.

Q. Now Mr. William—

A. That is, I was only there a few hours; and during the time I was there I automatically received the merchandise.

Q. And did you purchase other items for Mr. William Harrah when he would ask you to? A. I did.

(Testimony of Charles J. Brown)

Q. What other items were there that you purchased for him?

A. Well, little incidentals and things that were connected with the business.

Q. You mean with the liquor business?

A. Yes. [24]

Q. Was there any other business that you purchased things for him?

A. Why, yes, yes; later on when I was in business over there for myself, which I am—in the Bridgo game—I bought merchandise for him; and I sometimes borrowed stuff off of him and paid it back just the same as I have with Robbins and other people.

Q. Where would you borrow that stuff? Where would he have it located?

A. If I bought some of the merchandise, automatically I might have taken some of it and bought a little bit for myself at the same time that I may have purchased it for him.

Q. In other words, you may send some to him and you may keep some; but you did not distinguish as to whether it was—

A. I always did. I paid for mine. Using similar things—or I have even bought merchandise off of Robbins and Robbins bought stuff off of me—just temporarily.

Q. Yes. And you would temporarily just take it and—

A. No, no, I didn't just temporarily take it. A notation was made, and it was replaced.

(Testimony of Charles J. Brown)

Q. But you had full control—

A. No, I didn't.

Q. —as to how that was done?

A. I had no control over it at all. I just automatically used some of it, and that was the answer to it.

Q. I see, just automatically did it. [25]

A. Replaced it.

Q. Then after you would get his merchandise, would you send some of it up to Reno?

A. If I had any sent to Reno, I had it sent from the source of supply.

Q. Whenever you ordered anything for Reno, you would send it direct to Reno?

A. That's right, instruct the person who happened to make the stuff.

Q. You would have him ship it direct? A. Yes.

Q. So that it never came to you? A. Yes.

Q. And this stuff you just borrowed from Mr. Harrah, how was it that that came to you?

A. How was that?

Q. This stuff you say you automatically borrowed from Mr. Harrah, how would that stuff come to you so that you could automatically borrow it?

A. Sometimes they come from Mr. Robbins or somebody else where we got merchandise.

Q. I am talking about Mr. Harrah.

A. That is what I am talking about. This is a market where you can't always get stuff. We all down there have a little arrangement among ourselves, there's a little reciprocity: we borrow and take and pay back when—  
[26]

(Testimony of Charles J. Brown)

Q. Mr. Harrah was not operating a game at Venice—  
A. I am explaining the situation.

Q. —so you could not borrow anything from Mr. Harrah unless you had it shipped to you to be re-shipped to Mr. Harrah, could you?

A. Most of the stuff Mr. Harrah ordered in Reno was directly shipped to him—

Q. Yes.

A. —and I believe there was one shipment that came in that was re-shipped.

Q. That was re-shipped? A. Yes.

Q. Mr. Harrah would call you on occasions?

A. I have talked to him a number of times on the 'phone.

Q. And he would say what, "Charley, will you go down and buy me some merchandise?" A. Yes.

Q. And what would you say to him?

A. I would say, "I will see what I can do."

Q. Then you would go look for it?

A. I would try to make an effort through various contacts we had and try to get the merchandise.

Q. How many times a week would you say you would be called upon to do that type of work?

A. I might do it once or twice a week, and I may not do it again in two months. [27]

Q. It all depended on the needs of Mr. William Harrah? A. Yes.

Q. That contact, that manner of doing business, continued over how long a period of time, would you say? When did that first start, that type of—

A. That I couldn't say.

(Testimony of Charles J. Brown)

Q. Well, would you say it started about when Mr. Harrah opened his place in Reno?

A. Oh, at different times.

Q. Was that about when it started, though?

A. Well, most of the things that I have sent up there or bought—or had bought, that I paid for—was since the acute shortage. Everything else prior to that time was automatically ordered from that end, where they could get it. And there being shortages, we had to shop for merchandise.

Q. So you go around and shop?

A. I didn't go around at all. I simply used the telephone to various places that it was possible to get that particular merchandise.

Q. In other words, whatever was necessary to get that merchandise you would do? A. That's right.

Q. That, I assume, is continuing up to the present time?

A. Yes, I think I sent him a couple of white shirts a couple of weeks ago.

Q. Have you ever been employed by the Abbot Kinney [28] Company? A. I have.

Q. When were you employed by the Abbot Kinney Company?

A. I think it was in '43. Mr. Gerety could answer that better than myself, I think. I was discharged there a year ago last April, I think.

Q. How long did you work for the Abbot Kinney Company?

A. I worked on a commission basis on collections at the time that Mr. Burns left. I don't know the exact date.

(Testimony of Charles J. Brown)

Q. Did you have any source of income other than from your Abbot Kinney Company commissions during that period of time?

Mr. Cobb: We object to that on the ground that that is personal, has no bearing on the issues of this case.

The Referee: Overruled.

You may answer.

The Witness: I will be very glad to answer that question, because I think when I first started to work for the Kinney Company I earned at the rate of about \$40 a month. So it would hardly keep me. I think that can be verified by Mr. Mapes over there (indicating), who was the bookkeeper.

Mr. Davis: Q. What other source of income did you have at that time, Mr. Brown?

A. I just shortly before that sold out a business in San Diego.

Q. What business was that? [29]

A. I operated a large service station and wash rack.

Q. Do you recall what you received for that?

Mr. Cobb: We object to that on the ground that that is incompetent, irrelevant, immaterial as to any of the issues here and is an attempt to inquire into the man's personal affairs.

The Referee: Overruled.

Answer the question.

Mr. Davis: Q. Answer the question.

A. What did you ask?

Q. Do you recall what you received for that—

A. I was in business for myself down there.

(Testimony of Charles J. Brown)

Q. And what did you receive when you sold that business? A. What did I receive?

Q. Yes. How much money did you get for that business?

A. I think I sold out that equipment around—a little between two thousand and twenty-five hundred dollars.

Q. Between two thousand and twenty-five hundred dollars? A. Yes. That was for the equipment.

Q. That was what you received for that business, was it, when you sold it?

A. That's right. That was for the equipment, I think—as I remember.

Q. Did you receive any other money for good-will or anything like that, or was that the total amount?

A. I think that was the final settlement. [30]

Q. Was that your source of income during the time you were working for Abbot Kinney Company, too?

A. I always had money. I always had a few dollars.

Q. How many dollars did you have?

A. I always had quite a few, maybe four or five or six thousand dollars.

Q. Four or five or six thousands dollars?

A. Yes.

Q. Where did you do your banking?

A. I done my banking in the San Diego Trust and Savings.

Q. How long did you bank at the San Diego Trust and Savings?

Mr. Cobb: To which we object, your Honor. It is wholly immaterial, far afield, immaterial to any of the issues of this case.

(Testimony of Charles J. Brown)

The Referee: What is the relevancy of this testimony, Mr. Davis?

Mr. Davis: I might state, your Honor, that the evidence, as it will develop—this particular point I haven't had; but the evidence will show, I am firmly convinced—that Mr. Brown had no substantial source of income; that all of a sudden he becomes very affluent and can spend all kinds of money and this developed only after an involuntary petition in bankruptcy had been filed against John Harrah—John Harrah failed to get a discharge in bankruptcy and there is an outstanding obligation against him of [redacted] and from [31] that date John Harrah did business through Charley Brown and through his son William Harrah; and this whole transaction is a machination of John Harrah in control of the Executive Committee of the Abbot Kinney Company, one of the directors; and that he and Eddie Gerety and Charles Brown and William Harrah conspired to defraud the Company of this money.

Mr. Cobb: I don't want counsel's false remark to indicate that that was brought out on any 21-A.

Mr. Davis: He indicated that—

The Referee: Gentlemen, remember the 21-A examination is not in this record. The objection is overruled.

Mr. Davis: Might we have that question?

The Referee: Please read the question, Mr. Reporter.

(The reporter read the following question: How long did you bank at the San Diego Trust and Savings?)

The Witness: For the full length of time that I operated in San Diego.

(Testimony of Charles J. Brown)

Mr. Davis: Q. How long was that, Mr. Brown?

A. Oh, I don't know. I think it was 1936 when I left there.

Q. 1936. And what did you do after 1936?

A. I came back to Venice, and my bank account then I opened—oh, yes, I had—during the time I was in San Diego I had a bank account in the Security-First National at Venice.

Q. You had a bank account at both the Security-First [32] National Bank in Venice and—what was the name of the bank in San Diego? A. That's right.

Q. What was the name of the bank in San Diego?

A. I just told you.

Mr. Davis: And what was that, Mr. Reporter?

The Reporter: The San Diego Trust and Savings.

Mr. Davis: Q. Now you returned to Venice in 1936?

A. I am not exactly positive. I think that it was about then.

Q. And then what did you do when you came back to Venice? Is that the time you started working for William Harrah?

A. I can't just exactly think about what happened after that. I don't remember.

Q. You don't remember?

A. I don't believe I did anything right after that for the time being.

Q. In other words, you loafed for quite a while after that, did you not?

A. Not necessarily. I was always active in one thing or another.

(Testimony of Charles J. Brown)

Q. Did you have any other source of income?

A. I always had money to carry me along. I was never on relief. I always had enough to get along and pay my obligations and not enter into debt.

Q. How much would you say your income was in, say, 1936? [33] A. I forget exactly what it was.

Q. Would you say it was a thousand dollars in 1936?

A. I think you are being—putting it rather low, because even while I was in San Diego I still maintained my home in Venice.

Q. Were you married? A. Yes.

Q. Have you children? A. Yes.

Q. Are they living with you? A. No, married.

Q. What did you say your income in 1936 was?

A. I just can't remember.

Q. Do you file income tax returns? A. I do.

Q. Did you in 1936? A. I think I did.

Q. Do you still have copies of your 1936 income tax return? A. I think I have, I am not sure.

Q. Could you produce those income tax returns if you were so instructed by the Court to do?

A. I don't know whether I could or not.

Q. How about your 1937 income? What income did you have then?

Mr. Cobb: We object on the ground that that is entirely [34] too remote, your Honor. This transaction occurred in 1944.

The Referee: Overruled. Go ahead.

The Witness: I don't know whether I have got those old papers or not.

(Testimony of Charles J. Brown)

Mr. Davis: Q. What income did you have in 1937?

A. I don't know whether I had anything or not. I can't remember. I am just telling you I don't remember exactly what took place in 1937.

Q. How much income did you have in 1938?

A. I don't remember.

Q. Well, would you say you had \$500 income in 1938? A. Oh, I think I had more than that.

Q. Would you say that you had a thousand dollars in 1938? A. Yes, I had at least about \$3500.

Q. Around \$3500. What was your source of income in 1938, Mr. Brown?

A. I don't know. I can't place—I can't place dates with operations.

Q. What businesses were you in in Venice since 1936 and before you started getting these leases from Abbot Kinney Company? A. I don't know.

Q. You don't know that you were in any businesses around there?

A. Let's see, I would have to refresh my memory on those things. I haven't thought about what I did over those periods [36] of time.

Q. Do you recall any business at all that you were in in 1936 at the time you first got your lease, your first lease, from Abbot Kinney Company?

A. At the time I got my first lease from the Abbot Kinney Company, I think that was in—I think that was in October. I forget, I have to refresh—I would have to refresh my memory on some of those things.

(Testimony of Charles J. Brown)

Q. Up until the time you got your first lease with Abbot Kinney Company, when you returned to Venice, what business were you in, if any?

A. Well, I will have to refresh my memory.

Q. That is what I am trying to help you do.

A. I am doing the best I can. I can't remember just exactly what was the first one.

Q. Just tell me what business you were in during the period from 1936 up until the time you got the first lease from Abbot Kinney Company.

Mr. Cobb: When did you say the first lease from Abbot Kinney Company was?

The Referee: Let us establish that fact.

Q. When did you get your first lease from the Abbot Kinney Company?

A. I think the first lease I got from the Abbot Kinney Company—well, when I first got the lease over there on the Robbins Building. [36]

Mr. Davis: Q. Was that your first lease with the Abbot Kinney Company, the Robbins Building lease?

A. Wait a minute. Prior to that I had the lease on the game at the Plaza Building.

Q. Was that from the Abbot Kinney Company direct; or was that from William or John Harrah or the Plaza Building Company, whatever they called it?

A. I leased the fixtures in the old Plaza Building.

Q. Whom did you lease those from?

A. It was the property of William Harrah, and I paid him a rental on that—

Q. Yes. A. —when I operated over there—

Q. What date was that?

(Testimony of Charles J. Brown)

Mr. Cobb: Don't interrupt him. Let him finish that phase of the answer.

The Witness: Then I was closed up over there. Then my next operation was when I leased the Robbins Building through making arrangements with Harry Robbins for the fixtures. And we moved part of the fixtures of the old Plaza game into the Robbins Building.

Mr. Davis: Q. Did you rent those fixtures?

A. Yes, I still pay Harry Robbins a rent on the fixtures.

Q. Do you still pay William Harrah a rental on the fixtures? A. No. [37]

Q. What happened to those fixtures?

A. I purchased those.

Q. When did you purchase those?

A. At the time I moved over there, shortly before that,—there was a period of time there—there was a period of time when the fixtures were—we were settling and making arrangements to go over in there—that I purchased those fixtures from that—in fact it was the center section of the old game that was in there. And then we moved that over there. And I think I got that permit—I think it was in October.

Q. What year? A. I think it was 1943.

Q. In October of 1943—

A. I am not quite positive, but I think that's about the time. I am trying to fix about that time.

Q. So that that was the first lease, then, in October of 1943, that you had with the Abbot Kinney Company?

A. Well, now, I am not so sure. I don't know whether I got the lease—I think I got the lease on the

(Testimony of Charles J. Brown)

Slide around the 4th of July, around in July of '43. I am not quite sure, but I think that was it, because I opened up after that length of time—

Q. Are you referring to the Bamboo Slide?

A. Yes.

Q. And you believe the Bamboo Slide lease was the first [38] one you got from the Abbot Kinney Company?

A. No, no, I opened the other—I think that was in July.

Q. Which was in July, Mr. Brown?

A. I just can't be real truthful to you and tell you the honest God's truth.

Q. To the best of your recollection your first lease with the Abbot Kinney Company started about July of 1943? A. I think that was about it.

Q. Now you had a lease, you say, on the Plaza Building game, that game in the Plaza Building?

A. The Robbins Building?

Q. Your first lease with William Harrah, as I understand it, was in the Plaza Building?

A. Yes, I had a lease on that place temporarily.

Q. How long did you operate that?

A. That I don't know just exactly how long I did operate there. I wasn't very successful.

Q. You did not make any money out of that, did you, Mr. Brown?

A. I don't know—I made a few dollars, yes.

Q. How much did you make, enough to eat three times a day; or did you—

A. Did I eat like you do?

(Testimony of Charles J. Brown)

Q. Did you make enough out of that operation to eat like I do? [39] A. I am positive I do.

Q. How much would you say you made during that period, the period of that lease from William Harrah?

A. I really couldn't tell you.

Q. How long did you operate?

A. I can't just exactly tell you there. I would have to get the records from the Police Commission.

Q. Do you keep personal records on that?

A. I think I have.

Q. How long did you operate, do you recall, Mr. Brown?

A. Well, as long as I have been around there and operating, we have been opened and closed a number of times.

Q. I am talking about this particular lease that you claim you had with Mr. Harrah. How long did you operate that game?

A. I forget the exact length of time.

Q. And you don't remember how much money you made, but you don't think it was very much?

A. I made a few dollars, always made a few dollars.

Q. You mean ten dollars a day net to you or—

A. Well, I never did think about ten dollars a day. We usually pay most of our help \$70 a week, from that on up to \$125.

Q. I realize that. That is why I am trying to find out how much you made during that period of time.

A. Well, I had quite a little legal difficulties; and I [40] spent considerable money with attorneys.

(Testimony of Charles J. Brown)

Q. So that by the time you got through you did not end up—

A. There was always something left. You can't chop wood without getting kindling.

Q. How much kindling would you say you had left, Mr. Brown, as the result of your—

A. I really couldn't say.

Q. Did you have \$500 left?

A. I always had a few dollars, Mr. Davis. It seems to me you are trying to say that I was destitute and never had nothing. I always had money. I had money ever since I came to Venice. When I came to Venice, I think I had \$25,000 in the bank. I had money in the—

The Referee: Answer the question.

Mr. Kitzmiller: When he first came to Venice, he had \$25,000 in one account.

The Referee: Go ahead.

The Witness: I have always—I have been active all my life. I am 64 years old. I have built buildings, I have built houses, I have done something of everything. I have been always active in one thing or another. I was President of the Board of Trustees of the City of Venice. And I think during that time I always spent considerable money. I've always moved here and there and always paid my own way.

Mr. Davis: Q. When did you say you first came to Venice? [41] That was back when?

A. I think I got there in November, 1919, after the World War.

(Testimony of Charles J. Brown)

Q. After that—

A. You want to go into prior to that time? I owned the biggest wholesale house in the San Joaquin Valley.

Q. You arrived at Venice in 1919 with about \$25,000?

A. I think that was the first deposit I made. I hadn't had a final settlement on things I had—

Q. Did you lose that money?

A. Oh, no. I invested it and went along. I was very active in Venice. I think shortly after I got there I built ten houses. I built a place for the Atlantic and Pacific.

Q. How much were you worth in 1936, when you came back to Venice?

Mr. Cobb: We object to that, your Honor. It is not the best evidence and calls for a conclusion and is not an issue involved in this case. In other words, they go out and try to quiet title and to rely on the weaknesses of somebody else's title and try to prove how much they were worth nine or ten years ago. At least I think that, until there is some foundation other than Mr. Davis' wild statements that Mr. Brown was destitute and had to get the money from some one else, the Court should have some limitation on going into a man's personal affairs. This man is not in bankruptcy. He is just a defendant here, and I think Mr. Davis will resent [42] later on when we put him on the stand and start going into his financial affairs. If we are going to play under that rule, I want that understood, that I want to go into Mr. Davis' affairs just the same as he is going into Mr. Brown's.

(Testimony of Charles J. Brown)

The Referee: Overruled. The Court will rule on the objections as they come up.

Mr. Davis: Q. Will you answer that question?

A. I don't know what the question was.

Q. How much were you worth in 1936, when you arrived back in Venice?

A. Oh, anywhere between five and eight thousand dollars.

Q. Five and eight thousand dollars cash? That was your total assets?

A. I wouldn't say they were my total assets.

Q. Let us just get a list of what you had in 1936.

A. Well, I've had that—most of it in cash.

Q. You had most of it in cash? A. Yes.

Q. And those were in those two bank accounts you were talking about? A. I had a safe deposit—

Q. Where was that safe deposit—

A. —in the Security-First National.

Q. In Venice? A. Yes.

Q. How much did you have in that safe deposit box? Did [43] you have cash in that?

A. I always had cash in there. I couldn't say the exact amount—no more than I could tell you the exact amount I have got in there now.

Q. Now from 1936, then, until June of 1943 you carried on no business, as I understand it, other than this one— A. What was that now?

Q. From—I will withdraw that—from July, 1936, when you returned to Venice, you do not remember any business or any source of income that you had up until

(Testimony of Charles J. Brown)

the time you took your lease with William Harrah on the Plaza Building; is that correct?

A. Oh, I think I made a few dollars and one thing and another, bought a few things and sold them. I had previously been in the real estate business.

Q. But you don't remember any of those deals? You don't remember any business that you were in?

A. Just offhand I just simply can't remember.

Q. And the deal you had with William Harrah was not profitable, according to your testimony?

A. Yes, I made a few dollars there. I told you that.

Q. Now you say you have known John Harrah for 25 years? A. Thereabouts.

Q. How long have you known Eddie Gerety?

A. Well, I have known Eddie Gerety—Venice is a very small town. It is practically a one-block town. You can walk [44] up and down, and you are sure to meet anybody. I have known Eddie Gerety ever since he has been a young man.

Q. Going back for a moment, did you have access to any safe of John Harrah in his office in Venice there?

A. Yes.

Q. You had access to John Harrah's safe?

A. He used to lock me up at night and take it.

Q. Did you have the—

A. Combination? I did.

Q. And you had access to it?

A. That's right, and never stole a cent of it.

Q. And you could go in and take that money out and deal with it as you saw fit?

A. The man trusted me, and we always had to have change and one thing and another; and I made up what-

(Testimony of Charles J. Brown)

ever it happened to be—or if they asked me to cash checks or anything like that, I automatically cashed them and put the check in and took the cash out. That was the process of conducting business while I was there. I paid small bills like beer and things like that. I took the cash out and put the receipt in. In fact, they wouldn't leave it unless you did pay them.

Q. And you would just go in and take out money?

A. Just take and throw it away, I suppose.

Q. And you had free access to the safe?

A. Yes, spend it and do anything I wanted to do with it, I guess. But I usually paid bills and put a receipt in so [45] that it was accountable to him at the end of the day.

Q. That was the way you had of doing business?

A. That was what I was paid to do.

Q. And how much a month did you receive for doing that, Mr. Brown?

A. I spent about a half a day there, and I think I got \$40 a week. I only put in part time, a few hours a day.

Q. Do you recall your testimony under 21-A proceedings when I asked you the question "Have you ever just gone into the same and taken money out" and you answered "No"?

A. I don't recall that; and if I did make such a statement, I want to withdraw it at this time.

Q. Do you know what position John Harrah holds with the Abbot Kinney Company?

A. He's a director.

(Testimony of Charles J. Brown)

Q. And do you know of your own knowledge how long he has been a director?

A. I heard him testify this morning—or yesterday, some time around—

Q. You knew of your own knowledge that he was a director in 1940, too, did you not?

A. Yes, I did.

Q. And you also know that since that time he has been a director of the Abbott Kinney Company?

A. I do.

Q. And you also know that he was a member of the [46] Executive Committee of the Abbot Kinney Company since 1942? A. Yes.

Q. And you knew that he was a member of that committee up until about December of 1944?

A. If you have fixed the date, that's correct.

Q. You knew that Eddie Gerety was the manager of Abbot Kinney Company, did you not?

A. Yes, conducted quite a little business. I worked under his supervision and followed out his instructions while I was there.

Q. You knew he was manager during all the periods from, say, 1940, until he was discharged in, say, November, 1944? A. That's right.

Q. You were in and out of the office of the Abbot Kinney Company practically every day for—well, say, from 1942, the middle of 1942, on until—

A. I was only in the Abbot Kinney Company office at the time I was employed there. I automatically took and made collections. And they were made in triplicate; and when I turned them into the office, I was given receipts for the money that had been turned over to them.

(Testimony of Charles J. Brown)

Q. After you were discharged as an employee, you obtained certain leases from the Abbot Kinney Company, did you not?

A. That's right. I found an opportunity to engage in business. Naturally being around and associated with that thing where there is possibilities—and I paid 30 per cent [47] of my gross receipts.

Q. From that time on you were in and out of the Abbot Kinney Company office practically every day, were you not?

A. I was—I didn't go into the Abbot Kinney Company so very much, only as the occasion called for it. I wasn't running in and out of the office.

Q. As a matter of fact, you were in and out of the office almost every day or four or five times a week with Mr. Harrah and Mr. Gerety, too, were you not?

A. I think you are mistaken. I don't believe I was ever in the office or went into the office with Mr. Harrah. The only business I transacted with Mr. Gerety pertained to the business I had with the Abbot Kinney Company.

Q. With whom did you negotiate for the lease on the Robbins Building?

A. Well, the Robbins Building was—I negotiated the lease. First I talked to Mr. Gerety, and I got a sanction that it would be all right. But first I had to take and come to some understanding with Harry Robbins. So Harry Robbins said—well, I promised him a part of the profits; and he said, "Well, all right," he said, "then you pay me the rent."

I said, "Harry, it don't make a bit of difference to me. I will pay you the rent."

He said, "Then I will pay the Kinney Company."

(Testimony of Charles J. Brown)

So that continued for some time until I was raised the rent to \$500 a month. Then I paid to the Kinney Company. [48]

Q. With whom did you negotiate that lease with the Kinney Company?

A. I first talked to Mr. Gerety.

Q. Then who did you talk to?

A. Then I took it up, I guess, with the Executive Committee.

Q. Did you ever discuss it with John Harrah?

A. Yes, I told him what I was trying to do.

Q. You told him that before you entered into the lease with Mr. Robbins?

A. No, first I talked to Harry Robbins about that, because there was a lot of uncertainty about it and we had just started something new there. And I figured that in the venture there we had better see how it would work out. So I negotiated with Harry Robbins; and that was the understanding we came to, that I was to pay him the rent and then afterwards he wasn't satisfied with the arrangements having been made, and I agreed to pay him so much rent per week for the use of the fixtures.

The Referee: Q. Let me ask you this question: Which is the Robbins Building, Mr. Brown?

A. That is the one I occupy now; it is the triangular one that sets right alongside of the High Ride.

Q. And where is the Plaza Building?

A. The old Plaza Building was directly across the street, around the corner. It was a store-room over there, about maybe 75 or 80 feet off of Windward Avenue, the entrance of [49] the pier.

The Referee: Go ahead.

(Testimony of Charles J. Brown)

Mr. Davis: Q. You said that there was something new being started there?

A. I didn't say anything.

Q. Well, I understand you to say that you were planning on starting "something new" in the Robbins Building and you went to Mr. Robbins to talk about it, to talk about the lease. What did you mean by that statement that "something new" was being started?

A. I didn't say something new had been—

The Referee: I think you did use that expression, that you started "something new."

The Witness: Oh, we were about to make an application for a permit to the Police Commission.

Mr. Davis: Q. You were starting a new game; was that it?

A. It was a little differently described in the permit, when I applied for the permit.

The Referee: Q. What was it?

A. A Bridgo game.

The Referee: Go ahead.

Mr. Davis: Q. And were you a party to an action to determine the validity of that?

A. I was. In fact I fought it all the way through.

Q. You paid the cost of prosecuting that action?

Mr. Cobb: We object to that on the ground that it is [50] immaterial. What bearing has that upon the issues of this case?

The Referee: Sustained. Proceed.

Mr. Davis: I think it will be shown, your Honor, that the fee was paid by John Harrah, as I understand it. At least that is the admission made around in Venice, that

(Testimony of Charles J. Brown)

he paid for prosecuting that action. And why would he pay for it unless he was interested in—

Mr. Cobb: That is a false statement. I am tired of his making false statements like that.

Mr. Davis: I am trying to get it out. That is the information I have, Mr. Cobb. I am merely trying to find it out. I don't know.

The Referee: I will vacate the ruling and overrule the objection.

Answer the question: who paid the expenses of the litigation you have just mentioned?

The Witness: Well, to the very best of my knowledge the litigation was conducted and paid jointly by several of us that were operating that game.

Mr. Davis: Q. You say to the best of your recollection. What information do you have on that, Mr. Brown?

A. I contributed financially toward the payment of the suit.

Q. And who else contributed?

A. Robbins and the other operators. [51]

Q. Were there other operators there at Venice at that time?

A. Venice runs all the way to Ocean Park; and the—that was the way it was handled.

Q. And to your knowledge did William Harrah or John Harrah contribute anything to that?

A. Not to my knowledge. Mr. Harrah is the best advised on the technical operation of the game, and the operators always sought advice from him on how to conduct it. And that was his business.

(Testimony of Charles J. Brown)

Q. So you took it to Mr. Harrah, talked to him about how to conduct your business, did you?

A. Yes, sir, I have always sought his advice in that business, because I thought he was the most competent and capable. In fact, I had paid him certain fees for just such a purpose as that.

Q. With whom did you negotiate for the Bamboo Slide, the lease on the Bamboo Slide?

A. Well, I think I first talked to Mr. Gerety. They had had some trouble with Bullock—Hargraves and Bullock. And I said, "Eddie, I would like to get that place if you are going to make some changes out there."

"Well," he said, "I don't see why you can't." He said, "What will you pay?"

I said, "I will pay 30 per cent rent"—they were only paying 25. [52]

So he said, "I will see about it."

So I talked it over, and ultimately I got the lease on the Bamboo Slide.

Q. Did you ever talk to Mr. John Harrah about it?

A. I don't know. I might have discussed it. I do know I talked to Mr. Gerety.

Q. Has Mr. John Harrah ever received any of the moneys which you made out of the Bamboo Slide?

A. He has not.

Q. Has Mr. William Harrah ever received any of the moneys which you made out of the Bamboo Slide?

A. No.

Q. Has Mr. William Harrah ever received any money that you have obtained out of the operation of the Robbins Building lease? A. Not a cent.

(Testimony of Charles J. Brown)

Q. Has William Harrah ever received any of it?

A. Not a cent.

Q. With whom did you negotiate the Merchants Building Parking Lot? A. With Mr. Gerety.

Q. None of these discussions was had with John Harrah in the first instance?

A. The Merchants Building Parking Lot? Why, it isn't anything to get excited about. It parks 66 cars. There is very little business over there in the daytime. There is a [53] little over the week-end. There is \$150 a month rent, a woman at \$40 a week for working over there daytimes; and I pay a night man—

Q. Would you answer my question: I just want to know with whom you negotiated?

A. Well, after having the game over there, it was advantageous to have a place to—I talked to Mr. Gerety.

Q. Did you talk to Mr. John Harrah about it?

A. I may have discussed about the possibilities and the advantage of conducting a game and that I might want a lease on it. I don't believe any one wanted to outbid the lease on the parking lot.

Q. So whenever you wanted anything from the Abbot Kinney Company or any information regarding the Abbot Kinney Company you always went to Ed. Gerety; is that correct? A. He was the manager.

Q. And so far as you knew, he was in full charge of the activities of the Abbot Kinney Company?

A. That's right.

Q. And he was so held out by the Abbot Kinney Company, wasn't he, as the one with whom to deal?

(Testimony of Charles J. Brown)

Mr. Kitzmiller: Just a moment. Before you answer that, I object to that on the ground that it calls for the conclusion of the witness.

The Referee: Sustained.

The Witness: Why— [54]

The Referee: You do not need to answer that. Go ahead.

Mr. Davis: Q. When did you first learn about the Cruickshank Company sprinkling system contract?

A. Well, after I was discharged, there was a terrible lot of turmoil. They were going to cancel all the leases. Everybody that had any leases on the pier was very much upset. So I had heard about the Cruickshank contract, and I talked it over with—Eddie Gerety called it to my attention.

He says, "By God, it looks as though we are going to be thrown out of here. There seems to be quite some trouble."

And quite some time before that there was a rumor Mr. Williams wanted to get the job I had. That was all right with me. So I thought the best thing to do was to protect ourselves as far as possible—myself.

Eddie says, "I will make a date over there and see what we can do."

So we went down to Mr. Darling's office and talked it over.

Q. That was the first time you had known of the existence of the Cruickshank Company contract, was when it was called to your attention by Eddie Gerety?

A. I knew that the contract had been operative or heard it discussed down there for a long time. While

(Testimony of Charles J. Brown)

it was not a daily discussion, it had been discussed at various times and brought up.

Q. And the first time it was called to your attention as to the possibility of purchase was when Mr. Gerety had this [56] conversation with you that you just gave?

A. No, I had heard about you and Mr. Newton anticipating purchasing it and neglecting to acquire it.

Q. When did you first hear that either Mr. Newton or I had an opportunity to purchase that contract?

A. I really just couldn't state the exact time.

Q. Would you say that was—

A. We worked from one day to the next day, and I can hardly separate months or—

Q. Was that a year or more before you purchased it?

A. I just exactly can't say.

Q. Or was it just a few days before you purchased it?

A. I should say several months. It was evidently dead and buried at the time it was resurrected, at the time it was brought up by Mr. Gerety.

Q. Do you recall the purchase price that I was to pay to purchase that contract?

A. No, that wasn't discussed so much.

Q. You did not hear that figure mentioned?

A. I heard something about \$10,000 at one time—yes, I did, come to think about it. When I was in Mr. Darling's office, he said they had given you an option at one time and that the time had elapsed and there was some discussion at that time so that you were totally washed out of the picture as to any right, title, or interest, in being able to acquire the contract. [56]

(Testimony of Charles J. Brown)

Q. At that time Mr. Darling did not mention to you the fact that I had the right to purchase it for \$10,000, did he? A. He did not say anything like that.

Q. Where did you get that \$10,000 figure?

A. Hearsay.

Q. And from information you had before you went in to see Mr. Darling?

A. No, it was pretty nearly all a closed situation. It was discussed there—one way or another, I can't tell you how, when, or where; but it was a dead issue at the time I started negotiating the deal with Mr. Darling.

Q. You say it was dead. Mr. Gerety told you it was a live issue, did he not?

A. I mean at the time I went in with Mr. Darling, he led me to believe that there was no connection with the deal that had been in the past.

Q. In other words, Mr. Darling just told you that the Davis interests had no further right to purchase that contract so far as Cruickshank and Company were concerned?

A. No, he referred—I don't know whether he referred to Davis or you or Mr. Newton. I believe he did refer to Mr. Newton.

Q. Mr. Brown, where was that conference between you and Mr. Gerety when Mr. Gerety first mentioned it to you? A. I don't know. We might have—

Q. Was that at the office of the Abbot Kinney Company? [57]

A. I think when he first brought it to my attention, talking about that, we were either out on the pier—I believe we had had a slight fire or something, where some of those sprinklers had performed very well. I think

(Testimony of Charles J. Brown)

there had been a fire out on the end of the pier in one of those buildings, or something. And he said, "Well, the old sprinkling system still saved our lives" or something like that. He said, "By God, it might be a good idea to get hold of that as long as they are going to throw us out of here. It might be a way to protect ourselves."

Q. Did Mr. Gerety point out to you that the contract had been in default since 1932 approximately and that there was \$137,000 due on it and nothing had been paid during all that time?

A. He might have called my attention to that. When I became interested in that, I discussed it with Mr. Pool.

Q. Who is Mr. Pool?

A. He is my attorney and had been.

Q. What did you do with Mr. Pool? Did you take the contract to him for an opinion?

A. No, I explained the situation about the contract and about the purchase—

Q. What did you say to Mr. Pool about the terms of the contract?

A. Now up to that time, when Mr. Gerety had called my attention to it, I had no idea about the figure that could be [58] arrived at; and I talked to my lawyer, Mr. Pool, over there (indicating).

I says, "What do you know about this contract? Mr. Gerety has called it to my attention."

He says, "I think it is a good contract."

Q. Then he knew all about the terms of the contract, did he, at the time he talked to you about it?

A. I think he was conversant with the contract.

(Testimony of Charles J. Brown)

Q. As a matter of fact, he—

A. But I hadn't discussed the price of the purchase with Mr. Pool.

Q. But he did know about the contract and seemed very familiar with it and— A. Yes.

The Referee: Please fix the time of this conversation.

Mr. Davis: Q. When did that conversation take place?

A. Shortly before that I purchased the contract.

Q. You purchased the contract at what time?

A. I forgot the exact date.

Q. Some time in June of 1944?

A. Have you got—

The Referee: What is the date, gentlemen? Is there any question about it?

Mr. Davis: There isn't any question. I have never heard the exact date. I have tried to get it myself, your Honor. If there is an assignment there, I would like to see it. [59]

Mr. Kitzmiller: The 13th day of June.

The Referee: 1944?

Mr. Kitzmiller: 1944.

The Referee: If the contract was purchased June 13th, 1944, what was the first time approximately that Mr. Gerety talked to the witness?

The Witness: I think it was the latter part of May or about the first of June, along about that time.

The Referee: Q. In other words, you would say not to exceed 30 days elapsed between the date of the first conversation?

A. Before I become interested in purchasing it?

(Testimony of Charles J. Brown)

Q. That is what I mean. A. Yes, sir.

Mr. Davis: Q. What did Mr. Gerety say to you about the validity of that contract?

A. Well, I didn't get any opinion. My opinion was based upon Mr. Pool's deductions from the contract and what I had heard and the effort that you had put forth, that you were willing to purchase it but were unable to raise the money.

Q. You heard that, did you, that I had been unable to raise the money and that I was interested in it, and that was the thing that interested you in it?

A. That is what made me believe the contract was good.

Q. Did you have any conversation with me about the contract? [60] A. No, I didn't.

Q. And you did not know whether I actually had that, did you?

A. Mr. Newton was very active in it, and I considered your legal opinion as being worthy of some consideration.

Q. Did you have my legal opinion on it?

A. No, just from the effort you had put forth on it over there I considered it worth something.

Q. Did you know of any effort I had put forth?

A. I heard that you had anticipated at one time purchasing it, and I didn't think you would purchase bad merchandise.

Q. Whom did you hear that from?

The Referee: Let us not go into these minor matters.

Mr. Davis: Q. Did you hear that I had offered that to the Abbot Kinney Company for the price of \$10,000?

A. I might have heard that. I don't know.

(Testimony of Charles J. Brown)

Q. Did you hear that I had approached the members of the Board of Directors of the Abbot Kinney Company and urged them to purchase that contract at the price I could get it for, at \$10,000?

A. The only rumor I heard, Mr. Davis, was that 24 hours before your option had expired you and Mr. Newton had made an effort to have the Kinney Company buy it.

Q. At \$10,000?

A. The option you had had for some time. [61]

Mr. Kitzmiller: May we have that time fixed as to when that so-called option period was and as to the 24-hour—

The Referee: Yes. Mr. Reporter, please read that answer.

(The reporter read the following answer: "The only rumor I heard, Mr. Davis, was that 24 hours before your option had expired you and Mr. Newton had made an effort to have the Kinney Company buy it.")

You spoke about a 24-hour period. When was that 24-hour period if you know?

A. I don't know when—how long ago that was—

Q. You don't know? All right, go ahead.

A. —because it was just hearsay.

Mr. Davis: Q. Did you discuss with Mr. Gerety the possibility of receiving payment on account of that contract if you did go ahead and purchase it?

A. Well, I figured, after talking it over with Mr. Pool, that it would be kind of a leverage; in case they would try to push us around, we could come to satisfactory arrangements; and that it would be a good thing to have.

(Testimony of Charles J. Brown)

Q. Well, did you discuss with Mr. Gerety the possibility of payment, getting your money out of the contract?

A. Mr. Gerety felt that the contract was good from his past experience—one way or another, his connections or one thing or another—he felt that the contract was good.

Q. What did he say to you in regard to that matter? [62]

A. We discussed it over there; and he said, "Let's buy the contract together." I said—he said, "You can put up the ten," he said, "or a portion of it," he says. "I will take all I can."

The final conclusion was that when the actual price was \$15,000 that I would put up ten and he would put up five.

Q. Did Mr. Gerety tell you at that time how much available cash the company had to pay a down installment on the contract if you purchased it?

A. No, he did not.

Q. Did he make any statement to you that there was money that could and would be made available for that purpose?

A. No, he did not. When I discussed it with Mr. Harrah, he advised me about not purchasing the contract?

Q. Mr. John Harrah you are talking about now?

A. Yes, sir.

Q. When did you first talk with Mr. John Harrah about it?

A. Some time during the process of acquiring the contract.

(Testimony of Charles J. Brown)

Q. What did Mr. John Harrah say to you?

A. He told me he didn't think it would be a very good thing to buy in view of the fact that if the bond-holders foreclosed all I could hope to receive back would be that portion of uncollected rents or various things of that type—or moneys that may have accrued in the Kinney Company outside of the—

Q. Did you tell Mr. Harrah that you were going to go [63] ahead and buy it?

A. On the advice of Mr. Pool, yes, I acquired the contract.

Q. You told Mr. Harrah you were going to do so?

A. I did—after I had purchased it.

Q. You knew Mr. Pool was also Mr. Harrah's attorney, did you not?

A. I don't know. He practiced law. I don't know his clients.

Q. You knew, as a matter of fact, that Mr. Pool had represented Mr. Harrah in some matters, did you not?

The Referee: You had better distinguish, Mr. Davis, between the Harrahs here. Which Harrah are you talking about?

Mr. Davis: They are so closely interwoven I don't know what name to use.

Q. Let us take John Harrah first. You know that Mr. Pool represented John Harrah on occasions, did you not?

A. Yes, I believe maybe he did, because I have known Mr. Pool pretty nearly as long as I have known Mr. Harrah, since 1925, I guess, or 1924.

(Testimony of Charles J. Brown)

Q. And you also knew of your own knowledge that Mr. Pool had represented Mr. William Harrah on matters, did you not?

A. I believe he did, come to think about it; but I hadn't thought of it at that time.

Q. And you knew that Mr. Pool also represented the Abbot [64] Kinney Company on one or two matters, did you not? A. I believe he did.

Q. So that before you actually purchased the contract, you talked the whole matter over with Mr. John Harrah? A. I so stated a minute ago.

Q. Now did Mr. John Harrah tell you that he thought that was a good contract and that there was a good chance of having some money paid on account of it?

A. I just stated in my answer in regard to what Mr. Harrah told me.

Q. What did he say about receiving any payment on it?

A. He told me he didn't think the contract would be good in case the bondholders foreclosed, and that all I could hope to receive was the unpaid rentals or moneys of that type—there was a question of whether I would get my money back or not.

Q. Did Mr. Harrah tell you in his opinion the bonds were outlawed and that if you purchased it there might be a chance of getting the money that accrued from rents?

A. That was—it was stated all I would be able to get was the money accrued from rents.

Q. And that money was the money that would be available to you for the payment of that contract?

A. Only that I would receive a small proportion of that which I had outlaid if there was a foreclosure of

(Testimony of Charles J. Brown)

the bonds. But he had never stated to me that the bonds were worthless. [65]

Q. No, he stated to you that the bonds had been outlawed, did he not?

A. No, I don't believe he told me they had been outlawed. I have heard that discussed more since the trial has been in operation.

Q. And he stated that the money which you would get on that contract would be the money that was derived thereafter from—or any money that they had on hand?

A. I would have a lien on it.

Q. And that you would have a right to get that money? A. Yes.

Q. Did he tell you how much money the company had in its possession about the same time you purchased that contract?

A. Mr. Harrah never discussed any of the business of the Abbot Kinney Company with me.

Q. Did Mr. Gerety tell you about how much money the company had at that time? A. No, he didn't.

Q. Now after you had received your opinion from Mr. Pool and you had your discussion with Mr. John Harrah and you had taken the matter up with Eddie Gerety, you came to the conclusion, did you, that you would like to purchase that contract?

A. On the advice of counsel I figured the contract was good.

Q. So then what did you do? [66]

A. Mr. Gerety made an appointment with Mr. Darling, who represented the Cruickshank interests.

Q. That is Mr. Hugh Darling of the law firm of Guthrie and Darling? A. That's right.

(Testimony of Charles J. Brown)

Q. Now at the time you purchased the contract you knew that nothing had been paid on the contract from 1932 up to the date that you were considering purchasing it; is that so?

A. There had been a new, supplemented agreement—that was the last one—that bound the present Kinney Company toward the payment of the contract.

Q. In other words, they had renewed the contract?

A. That's right.

Q. But they had never made any payments on account?

A. Yes.

Q. So that the statute of limitations had not run on it but no money had been paid on it?

A. The fact that they had authorized the renewal of it made it seem to be a good contract. At least that is what Mr. Pool led me to believe.

Q. But you did know that no cash had been paid—

A. That's right.

Q. —on the contract since 1932?

A. That's right.

Q. And you knew that it had gone into default in about 1933, did you not? [67]

A. I knew that the new supplemented—where they had bound themselves and validated the contract—that evidently it must have been good. If it hadn't been, it must be good now because they acknowledged it.

Q. So then Mr. Gerety, you say, made an appointment with Mr. Darling? A. Yes, sir.

Q. And did you keep that appointment?

A. I went down and met Mr. Darling in his office.

Q. Approximately what date was that?

A. I can't just fix the date.

(Testimony of Charles J. Brown)

Q. We have set here the date of the purchase as the 13th of June, 1944.

A. Well, it was some time prior to that.

Q. Was that two or three days before you actually purchased it?

A. If I purchased it on the 13th, prior to that time I negotiated the purchase, because at the time I purchased it I came in with cashier's checks to purchase the contract.

Q. At the time you first went to see him?

A. No, I did not. I said if I purchased the contract on the 13th, I came there at that time to consummate the sale—the purchase, rather.

Q. What did you say then to Mr. Darling, and what did Mr. Darling say to you? What was said generally in the first conversation you had with Mr. Darling? [68]

A. Well, let's see: In the first conference he said—I think he said he would see what he could do. I think he had to take it up with Cruickshank.

Q. How long was that conference?

A. I think I spent most of the time waiting in his outer office until he dispatched some other business there before I got in to see him.

The Referee: Q. Was Gerety with you?

A. Yes.

Q. Anybody else? A. No.

Mr. Davis: Q. Mr. Gerety made the appointment?

A. Yes.

Q. Who did most of the talking while you were there, Mr. Gerety or yourself?

A. Well, I was very much interested, and I discussed it. Both of us discussed it with Mr. Darling. And I

(Testimony of Charles J. Brown)

guess we were there quite some time about the purchase, negotiating the purchase.

Q. And what price was suggested as the purchase price?

A. I think the first—I think the first time there we—I think he had to consult Cruickshank to determine what was going to be asked, I think. I am not sure about that, but I think he had to consult Cruickshank.

Q. Did he tell you to come back at a later date?

A. Yes, we came back. [69]

Q. Did he telephone you and tell you to come back, or did you make a date at that time to discuss it?

A. He had spent considerable time in Washington, and he was anxious to get things cleared up as soon as possible. And I think he made an appointment with us at a prescribed time, if I am not mistaken.

Q. And that was on the 13th day of June?

A. That was when the deal was consummated.

Q. And you then went back to his office with Mr. Gerety? A. We were both there.

Q. In the meantime had you talked to any one about the purchase of the contract?

A. I had previously talked to Mr. Pool.

Q. Between the time you first saw Mr. Darling and the 13th day of June did you have a further conference with Mr. Pool?

A. Well, I might have. I am pretty sure I did—or talked to him. I can't just exactly remember all those things. I mean he—I am sure I talked it over with Mr. Pool, and I can't say after the first meeting—I think after the first meeting I did talk it over with Mr. Pool.

(Testimony of Charles J. Brown)

Q. Did you tell him the result of your conference with Mr. Darling? A. Yes, sir.

Q. And then you decided to go back and meet with Mr. Darling on the 13th? [70]

A. If that was the date, yes.

Q. Did you have any discussion with Mr. John Harrah between the time you saw Mr. Darling and the time you purchased the contract?

A. I stated Mr. Harrah's position and his attitude.

Q. I just wanted to know if you talked to him again and if you told him that you were actually negotiating?

A. I can't say that I did or didn't. I don't remember.

Q. It is possible that you did, though?

A. Possibly I didn't.

Q. Then you went down on the 13th and consummated the transaction? A. That's right.

Q. How did you pay for the contract?

A. Cashier's checks.

The Referee: Just a moment.

Q. Now, Mr. Brown, how many conferences in all did you have with Mr. Darling?

A. I think we had two.

Q. Just two?

A. Two. The first one I talked to him; and I think then he had to determine the price and we came back and settled its figure.

Q. Now if he did not tell you the price at the first conference, how did you know how much money to

(Testimony of Charles J. Brown)

take to the second meeting at which you say you consummated the [71] transaction?

A. I think that Mr. Gerety informed me what Darling would take for the contract. Mr. Gerety was the man who had known Hugh Darling for a long time.

Q. Otherwise your testimony now is that after the first conversation with Mr. Darling you learned from Mr. Gerety first that the Cruickshank Company would sell and secondly what they would sell for; is that right?

A. That's right. I would like to set this point straight: Mr. Darling represents some air line. He flies back and forth and here and there. And that was the reason, I think, that he got in touch with Mr. Gerety and set the price so that we could come and—

Q. And that price was?

A. I may have been in the office a third time, but I can't just state.

Q. It may be important. Now think back and see whether or not you got the price direct from Mr. Darling, and if so when and how, or whether you got the price through Mr. Gerety.

A. I think I got the price through Mr. Gerety, if I am not mistaken, because he got in touch with him.

Q. You say "he" and "with him." Whom do you mean?

A. I mean Mr. Gerety got in touch with Mr. Darling.

(Testimony of Charles J. Brown)

Q. After your first meeting with Darling?

A. Yes.

The Referee: Go ahead, please. [72]

Mr. Davis: Q. You arrived, then, with cashier's checks? What were those cashier's checks in the amount of?

A. My own was in the amount of \$5,000, and I think Mr. Gerety's was in the amount of \$2500.

Q. In other words, you had two \$5,000 ones and he had two \$2500 ones?

A. That's right. My own was \$5,000, and I think Mr. Gerety had two \$2500—they were all stipulated in the purchase.

Mr. Davis: (Addressing counsel) This is an exact copy, is it?

Mr. Kitzmiller: So far as I know, it is exact.

Mr. Davis: Q. I call your attention to a purported copy of the assignment and ask you to look that over, Mr. Brown, and let us know if that is an exact copy, so far as you can ascertain, of the assignment given to you on the 13th day of June, 1944?

A. I haven't my glasses with me, and I can't read this.

Q. Well, that is a bad fix.

The Referee: Well, your attorney is here. Perhaps he can advise you as to whether or not in his opinion it is a correct copy.

(Testimony of Charles J. Brown)

Mr. Kitzmiller: I—

The Referee: We can receive it on the same terms. If there is any necessity for correction, we can correct it.

The document will be marked Banrupt's Exhibit No. 2. [73]

I think we will take an adjournment at this time. Now, gentlemen, in order to obviate any technical objections here, could it not be stipulated that the rulings of Referee Dickson may be regarded as having been made in this one hearing over which I am presiding? In other words, it is a continuation of Mr. Dickson's proceeding up to a certain point and my taking over. Mr. Cobb expressed some anxiety as to whether he might have to review Mr. Dickson's rulings.

Mr. Cobb: I would like to have the matter go over and have it all be embodied in one order.

The Referee: Let us say, then, that it shall all be regarded as one proceeding?

Mr. Davis: That is satisfactory to us.

The Referee: Is there any objection to that?

(No answer.)

Everything will be incorporated into the one proceeding, and only one review will be necessary.

I now instruct all witnesses in the court room please to return to the court room at 2 o'clock without further notice. [74]

2:00 o'clock, P. M. session.

The Referee: All right, you may proceed, gentlemen.

CHARLES J. BROWN,

recalled for further

Direct Examination.

By Mr. Davis:

Q. When the contract was assigned to you, as I read that, the assignment was taken in your name alone; is that correct? A. Yes.

Q. And did Mr. Gerety at that time consent to having it taken in your name?

A. Well, I believe that there was some discussion at that particular time in Darling's office; and it was agreed upon between him and me that I should take it in my name and transfer him one-third interest.

Q. Was there any discussion why it should be taken in your name alone?

A. I can't remember a discussion. It was only coming to a conclusion. We talked it over there. Darling was there; and, as I remember, why, Eddie said, "Take it in your name and we can settle that out and straighten it out and you can transfer me one-third interest in it."

Q. Was there any other discussion of why it should be [75] put in your name alone and not also in Mr. Gerety's?

A. No, I can't remember that there was any discussion on that, only that was the conclusion that we come to after—I believe Mr. Gerety said it didn't make any difference, or something to that effect.

Q. So you just went ahead and had it put in your name? A. That's right.

(Testimony of Charles J. Brown)

Q. What did you do after you got that contract so far as the Abbot Kinney Company was concerned?

A. Why, after we got the contract, made the demand upon the Kinney Company for a payment.

Q. Was that demand in writing, or was that an oral demand at that time?

A. I just don't remember whether it was put in writing or whether it was oral.

Q. That was the time, was it not, that you appeared before the Executive Committee and made a request—

A. That's right, that's right, that's right.

Q. Now, as a matter of fact, you appeared before the Executive Committee on the 20th of June, did you not, which was one week after—

A. Yes, after I acquired it.

Q. After acquiring the—

A. And I think Darling said, "Well, now you have got it. Why don't you take some action" or something to that effect.

Q. Mr. Darling is an attorney at law? [76]

A. Yes, I guess he is.

Q. And he had, so far as you knew, represented the Cruickshank Company? A. Yes, sir.

Q. And he told you now that you had the contract to go ahead and make the demand?

A. No, he said, "You have got the contract. What are you going to do about it?" So I think there was some discussion about—they had made a previous demand or something.

(Testimony of Charles J. Brown)

Q. Who is "they"?

A. He, Cruickshank, or somebody had made a demand on the Kinney Company. I believe they had threatened to turn the water off or something.

Q. They had made that many times, had they not?

A. I don't know about the past, but at that particular time I think he said he had made a demand.

Q. But they had not taken any step to turn off the water?

A. I don't know whether the lapse of time under their demand had elapsed or not.

Q. Then you went in and demanded of the Abbot Kinney Company payment on account of the contract?

A. That's right.

Q. That was on the 20th of June, 1944?

A. That's right.

Q. One week after you got the contract? [77]

A. Yes.

Q. What happened? A. Well, I was paid \$7500.

Q. You were paid \$7500? A. That's right.

Q. What was said at that time?

A. Well, I said that the demand had been made under this contract and as long as we were the owners of the contract, why, I felt that we should be compensated and paid on the contract.

Q. And whom did you make that statement to?

A. To the Committee.

Q. And the Committee present at that time was John Harrah and Carleton Kinney; is that correct?

A. I think it was.

(Testimony of Charles J. Brown)

Q. Newton was absent?

A. I wouldn't say whether he was or he wasn't. I am not so sure whether Mr. Newton was there or not at that time.

Q. If the minutes of the Executive Committee meeting as of that time show that John Harrah and Carleton Kinney were present and Mr. Al. Newton was absent—

A. I will accept that.

Q. —would that refresh your recollection?

A. I would accept that.

Q. What did Mr. John Harrah say to you when you said you wanted some money on account? [78]

A. I don't know just exactly the words that were spoken at that particular time. I don't know whether they said they would take it under advisement—something evidently: I was paid some days later.

Q. Did Mr. John Harrah say that he didn't think that contract was worth anything and that he wasn't going to pay anything on account?

A. No, he didn't say anything like that. The fact is I got the \$7500. That is evidence in itself—

Q. Well, what did he say to you about it, about the payments?

A. I forget the conversation that took place.

Q. Did Mr. Carleton Kinney say anything at that time?

A. I think he entered into the discussion, certainly.

Q. What did he say?

A. I can't remember just word for word just what transpired there.

(Testimony of Charles J. Brown)

Q. I realize that, Mr. Brown. Just tell us as closely as you can.

A. To the best of my knowledge I got assurance I would get \$7500.

Q. How did you arrive at that figure of \$7500?

A. Well, the \$7500 was supposed to be one-fourth of the \$30,000 that was supposed to be paid at certain intervals.

Q. \$7500 was one-fourth of the \$30,000 yearly installment; is that right? [79] A. That's right.

Q. And you received—

A. One-fourth of \$30,000.

Q. One-fourth of that. Did they tell you that was about all they had in the treasury of the company at that time?

A. No, before I had made this demand, I had talked it over with Mr. Gerety. He was interested in it. I never acted of my own volition without consulting the man that was interested in the contract with me.

Q. And Mr. Gerety advised you as to the amount that the company had in its coffers at that time?

A. No, I did not discuss that at all. The only thing I discussed about—about determining the amount.

Q. Now what did he say about determining the amount?

A. Well, he thought we ought to ask for \$7500 anyway.

Q. Did he give you any reason for asking for that amount?

A. I can't remember whether he did or not. That's the amount we arrived at to ask for.

(Testimony of Charles J. Brown)

Q. In other words, you just walked in and you said, "Gentlemen, we want \$7500 on account of our contract"; and they said, "All right, you can have it"?

A. No, they discussed it.

Q. What did they say?

A. They discussed it pro and con. I don't know whether I left there and came back a little later or not. But they discussed it between themselves. [80]

Q. Mr. Gerety was not present at that Executive Committee meeting? A. No, he wasn't.

Q. Is that your testimony, that he was not present at that time?

A. No, I am sure Mr. Gerety wasn't in there at the time I made the demand.

Q. Well, every other time you had ever appeared before the Executive Committee Mr. Gerety was always there, was he not? A. No, he wasn't.

Q. All right, go ahead and just tell us what was said.

A. Well, I think I went over that. They discussed it between themselves.

Q. Did Mr. Gerety appear with you and make the demand, or did you appear alone?

A. I appeared alone.

Q. You appeared alone? A. Yes.

Q. You are sure that Mr. Gerety was not there and made the demand with you?

A. I am positive of that.

Q. So what did Mr. Carleton Kinney say, if anything, about the contract?

A. Well, as long as there had been a demand and threatened to turn the water off, why, they concluded it [81] would be a good idea to pay the \$7500 for the

(Testimony of Charles J. Brown)

services that had been rendered by—under the contract—in view of the fact that we had little minor fires now and then. So evidently rather than have the water shut off, they concluded that it might be good business to pay the \$7500.

Q. Did they ask you how much you had paid for the contract at that time?

A. I don't know whether that was discussed or not. I don't think so.

Q. Did you tell them what you had paid for the contract?

A. I don't believe that entered into the discussion at all.

Q. Did you serve a written notice upon the company that you had purchased the contract?

A. I don't know whether I notified them or not.

Q. Did you tell them at that time that Eddie Gerety had an interest in the contract?

A. I did. From the very inception I never practiced anything—from the time we purchased the contract, there was nothing hidden or anything else. It was known that we purchased the contract.

Q. And you told Carleton Kinney before you received the \$7500 that Eddie Gerety had an interest in the contract? A. Yes, I did.

Mr. Davis: Have you gentlemen seen this check (handing a paper to counsel)? [82]

Q. I call your attention, Mr. Brown, to a check numbered 558, dated June 23, 1944, in the sum of \$7500, "Pay to the order of Charles J. Brown, Abbot Kinney

(Testimony of Charles J. Brown)

Company, by John Harrah and Carleton Kinney," and ask you if you have seen that check before.

A. I endorsed it without a question of doubt.

Q. That is the check you received on the 23rd day of June, 1944? A. That is the truth.

Q. That is the \$7500 check you have been referring to? A. That's right.

Mr. Davis: I would like to introduce this, your Honor.

The Referee: All right, Bankrupt's Exhibit 3.

Mr. Davis: Q. Now, as I understand it, Mr. Brown, neither Mr. Harrah nor Mr. Kinney asked you what you paid for that contract at that time?

A. To the best of my knowledge they may not have asked me but I might have told them.

Q. Did they ask you what you would take to settle the contract in full for?

A. No, there was no discussion of that.

Q. They just were not interested?

A. They didn't discuss the repurchase of the contract.

Q. Now after you received the \$7500, what did you do with that money? A. I deposited it in the bank. [83]

Q. And which bank did you deposit that in?

A. The Security-First National.

Q. And then what did you do in regard to disbursing the money, if anything?

A. Why, I gave Mr. Gerety a check for \$2500.

Q. And what did you do with the balance of the money, if anything?

A. It automatically stayed in my account.

(Testimony of Charles J. Brown)

Q. Did you take any money out in cash and put in a safe deposit box?

A. No, I guess I had—I usually had a very substantial balance. I usually had a balance running anywhere from—oh, up to as high as ten or twelve thousand dollars.

Q. And did you put any of this money in this safe that you had access to of John Harrah's?

A. I never put any money in John Harrah's safe.

Q. What did you do, just take it out?

A. I never took any money out of John Harrah's safe.

Q. Whose safe was it you testified this morning you had access to?

A. I told you I was working for William Harrah in the liquor store and I took money out of William Harrah's safe in the conducting of his business and as I bought merchandise and stuff came in and I paid bills, if they delivered merchandise, and put the receipts in the safe; or I went to the safe and cashed checks and gave change to the business. [84]

Q. Well, that safe was in John Harrah's office, was it not? A. It was in William Harrah's business.

Q. Where was that located? Didn't Mr. John Harrah use that portion of the building for his office, too?

A. There was a desk in there, and Mr. Harrah was in their conducting William Harrah's business. But it was a store-room, if the truth was really known, because we stored our beer in there and all material and one thing and another used in the conducting of the business.

Q. Did any of this \$5,000 that you retained—

A. Never went into that safe, no.

(Testimony of Charles J. Brown)

Q. It never got into that safe?

A. Not a penny, no.

Q. After that do you recall that a petition in bankruptcy was filed against the Abbot Kinney Company?

A. That's right.

Q. And that was filed on the 21st day, I believe, of October?

The Referee: That is right, October 21.

Mr. Davis: Q. Now you found out about the filing of that petition right after it was filed, did you not?

A. Yes. I think the office was immediately notified.

Q. Yes, within a few days after that?

A. That's right.

Q. Then you were also advised, were you not, that there [85] was a special meeting of the stockholders of the Abbot Kinney Company being called for the purpose of electing a new Board of Directors, and that the notice was for November 8, 1944?

A. Why, I believe there was quite a little turmoil. Yes, I will accept those dates that you say.

Q. And knowing that the petition in bankruptcy had been filed and that a special meeting of the stockholders for the purpose of possibly eliminating the old Board of Directors had been called, you then made another demand upon the then existing Executive Committee for some additional money on account, did you not?

A. I did, on the advice of my attorney, Mr. Pool.

Q. Mr. Pool was representing you, then, at that time also? A. Yes, sir.

Q. And what did Mr. Pool advise you to do?

A. He told me the best thing to do was to make a demand on them for the agreed upon payment of \$30,000

(Testimony of Charles J. Brown)

which was to be paid for the coming year; and—and I followed his advice.

Q. So you followed his advice, and you prepared the written demand under date of November 6, 1944?

A. I did, in longhand.

Q. In longhand. Did you know at that time when you asked Mr. Pool as to what you should do that Mr. Pool was the attorney for Abbot Kinney Company?

A. No, I didn't know anything about that, because, he having been my attorney, I accepted his advice and I didn't [86] know anything about that.

Q. Did you know that he was actually representing the alleged bankrupt and had been so employed by the Abbot Kinney Company under date of October 24th?

A. No, I didn't know that. If I had possible known that and known that there was going to be complication, I would have been smart enough to have tried to hire another attorney or handle the matter in some other way so that I would save myself any complications.

Mr. Davis: Have you gentlemen seen this (handing a paper to counsel)?

Q. I call your attention, Mr. Brown, to a longhand memorandum on the letterhead of Abbot Kinney Company, dated November 6, 1944, directed to Abbot Kinney Company and purportedly signed by Charles Brown; I ask you if you have seen that document? A. I wrote it.

Q. That is in your handwriting?

A. My handwriting and I wrote it.

Q. You wrote this under the instructions of Mr. Pool, as I recall your testimony? A. I did.

(Testimony of Charles J. Brown)

Q. And this wording was Mr. Pool's wording, but you put it in your own handwriting?

A. That is what we wrote.

Mr. Davis: I would like to introduce this as— [87]

The Referee: All right, Bankrupt's Exhibit 4.

Mr. Davis: Q. Now when the written demand was made upon the Abbot Kinney Company, upon whom was that served? A. On the Executive Committee.

Q. And was that at a regular meeting of the Executive Committee, as you recall? A. I think it was.

Q. Who was present at that time?

A. Carleton Kinney and John Harrah. It was the regular meeting. I don't know whether Newton was there or not.

Q. Well, if I should say that the minutes of the regular meeting of the Executive Committee, dated November 7, 1944, at which this problem was discussed, show that only John Harrah and Carleton Kinney were present and that Al. Newton was absent, would you say that that was a fact? A. I would accept that.

Q. And you would say that was a fact? A. Yes.

Q. Was Mr. Eddie Gerety present at that meeting?

A. I don't think Eddie Gerety was ever in the Committee room when I was there.

Q. The Committee met in his office, did it not, in the Abbot Kinney Company?

A. Yes, but I don't believe he was in the office.

Q. What did you do when you went in and made the demand?

A. Well, I wrote it all out; and I guess they could read [88] English.

(Testimony of Charles J. Brown)

Q. Did Mr. Pool appear with you at that time?

A. No, he did not.

Q. Where was Mr. Pool when you wrote that letter, Bankrupt's Exhibit 4?

A. Let's see where I wrote that letter—

Q. As a matter of fact, you wrote that out at the Executive Committee just before you went in, and Mr. Pool was there; isn't that so?

A. No, I didn't. I think—I think I wrote that out in the old office of the Plaza Building that I had.

Q. And that was written out on the same morning that the Executive Committee meeting was held; isn't that so?

A. That night or afternoon, I forget which—or the night before.

Mr. Kitzmiller: It is dated the 6th.

The Witness: I think it was the night before—I wrote that out the night before.

Mr. Davis: Q. You wrote that out the night before?

A. Yes.

Q. Who was present at the time you wrote that out?

A. Pool and I.

The Referee: Q. I beg your pardon, I didn't hear you. A. Mr. Pool and I.

Q. Where did you write it?

A. I had an office in the back of the old game in the [89] Plaza Building.

The Referee: All right.

Mr. Davis: Q. Was Mr. John Harrah present at that time?

A. No, he wasn't. There was just Mr. Pool and myself.

(Testimony of Charles J. Brown)

Q. Does Mr. John Harrah have access to that office of yours in back of the Plaza—

A. He didn't have at that time. That was the old Circle game that was torn out. I had a desk in there, and I used it—had an old safe and stuff.

Q. Did Mr. Pool tell you they were going to have a meeting of the Executive Committee the next day and for you to come in and make that demand?

A. Well, I guess he knew there was going to be a meeting the next day or we wouldn't have prepared to make the demand the following day.

Q. Did he get in touch with you and tell you you ought to make the demand?

A. Well, he advised me right along on the contract, because he was my attorney.

Q. Did he tell you that all of the money of the Abbot Kinney Company was then in custodia legis; that is, in charge of the Court, because the petition in bankruptcy had been filed?

A. No, he didn't so inform me about that.

Q. Did you ask him if that bankruptcy proceeding made any difference so far as the payment of the \$30,000 was [90] concerned? A. I don't believe I did.

Q. You don't believe you did? A. No.

Q. Now how did you arrive at the figure of \$30,000 that you were going to demand?

A. That was supposed to be the annual payment.

Q. But you had already received \$7500 on account that year? A. But that was for a 90-day period.

(Testimony of Charles J. Brown)

Q. But you said you figured that on the basis of a quarter of the—how did you arrive at the figure of \$30,000?

A. That was what they agreed to pay every year.

Q. But that would mean they would pay \$37,500 in less than a year's time.

A. At the time I made the second demand, the \$7500 worth of service rendered had expired.

Q. You had been rendering a lot of service during that time, worth \$7500?

Mr. Kitzmiller: I object to that on the ground that it is argumentative and facetious.

Mr. Davis: Q. Had you been rendering some service?

A. The sprinkling system was put there in case of any fire.

Q. That is the same sprinkling system that had been there since 1931? [91]

A. And it put out many a fire.

Q. And it was the same that had been since 1931?

A. That's right.

Q. What did Mr. Harrah say when you went in and made the demand upon the Executive Committee for the \$30,000?

A. Well, I made certain inducements. I agreed to give them \$50,000 credit on their debt for a \$30,000 payment. They evidently conceded that it was good business.

Q. What did Mr. Harrah say?

A. They discussed that between themselves and come to the conclusion they would pay the money.

(Testimony of Charles J. Brown)

Q. Did they say anything in your presence that you heard?

A. They discussed it between them. I don't know as I paid a great deal of attention.

Q. Weren't you interested in what they were saying?

A. I was interested in it, but the most important thing was to come to some conclusion and if possible collect the \$30,000.

Q. Did they suggest that maybe you take a lesser amount than that?

A. Well, I set that figure; and I was rather positive about the figure.

Q. Did they just acquiesce and—

A. Said they would.

Q. —pay you the \$30,000? [92]

A. They agreed to pay the \$30,000 for a credit of \$50,000. They thought that was a Leap-year discount, I guess.

Q. How much, on your figures, did that then leave owing on the contract?

A. There was a balance of, I think, \$138,000.

Q. How much did it leave owing after you had given them all the credit you say you were going to give them?

A. I think \$138,000 is due on it yet.

Q. On it now? A. Yes.

Q. You would say the balance is \$138,000?

A. The balance is \$83,000.

Q. That is what you agreed would be the balance?

A. Yes.

(Testimony of Charles J. Brown)

Q. If they would pay you \$30,000 and agree to pay you the balance, the \$83,000, you would say that was in satisfaction of the contract?

A. When I made the demand and gave them credit for \$50,000 on the contract, there was no discussion as to what I would receive on the balance. That was a deal within itself and ended there.

Mr. Davis: Let me get that again, please, Mr. Reporter.

(The reporter read the answer.)

(Addressing counsel.) You gentlemen, I think, have seen this.

Q. Now, Mr. Brown, I call your attention to the letter [93] of November 6, Plaintiff's Exhibit 4, which specifically states, "You do by this acceptance acknowledge that the balance then remaining unpaid is approximately \$80,000"— A. That's right.

Q. —"which is now due and which you promise to pay." That was part of the deal, was it not, Mr. Brown?

A. That's the truth.

Q. So that you did in fact have a definite understanding at that time as to the balance that was due and that they would agree to pay it?

A. That was \$83,000—and accumulated interest. The agreement there stands for itself for what it states.

Q. Now you also provided in here that this was only conditioned upon the present directors' staying in office and that there be no change in the Executive Committee; is that correct?

A. That's right, because I figured—I had bought this thing for the sole purpose of protecting myself on the leases and there was some discussion about canceling

(Testimony of Charles J. Brown)

everything and one thing and another. If those things hadn't arose, I question whether I would have ever bought the contracts.

Q. As a matter of fact, Mr. Brown, by this time you had already had all of your leases renewed, had you not?

A. Naturally I had come along over there and asked for an extension of time and renewal on my leases.

Q. And this Executive Committee had already given you— [94] A. That's right.

Q. —a renewal on each one of your leases as far as they could under the present existing lease with the City of Los Angeles; isn't that right? A. That's right.

Q. So you had absolutely nothing to gain from the standpoint of leases by continuing this Executive Committee in control?

A. I believe that you questioned those leases right off of the reel and questioned those leases and said they were no good. There was some discussion about their being no good.

Q. That was all after the old Board was ousted?

A. The general turmoil around there. Even prior to the time there was a whole lot of general discussion about this and that, and the thing was in very much of an upset condition.

Q. But you already had the leases, did you not?

A. I attempted to protect myself as far as possible.

Q. Now I call your attention to check No. 739, the Abbot Kinney Company, dated November 8, 1944, in the sum of \$30,000, made payable to the order of Charles Brown by Abbot Kinney Company, signed by Harrah and Carleton Kinney, and ask you if you have seen that check? A. Yes, sir, and there is my name on it.

(Testimony of Charles J. Brown)

Q. And you received the check and got payment of the \$30,000? [95] A. I did.

Q. Then you knew at the time you received the \$30,000 that a petition in bankruptcy was then pending, the bankruptcy of the Abbot Kinney Company?

A. I knew some legal action had been taken.

Q. And that a petition in bankruptcy had been filed?

A. I think it had or was contemplated anyway.

Q. Well you knew? A. Yes.

Q. Yes. And you knew also that the notice had been sent that on November 8 a meeting of the stockholders had been called for the purpose of electing a new Board of Directors?

A. Yes, I heard that they had some trouble and one thing and another, contemplated making a change or something.

Q. Who told you that a meeting of the stockholders had been called for November 8th?

A. I don't know how I found it out.

Q. Did John Harrah tell you?

A. No, I don't believe he told me. I don't remember how I found out. I can't remember.

Q. Did Eddie Gerety tell you?

A. I wouldn't say that Eddie Gerety told me either. I don't remember how I heard the news.

Q. Now when you arrived at this figure of \$30,000, did you know that that was about all the cash that the company had available? [96] A. No, I did not.

Q. You didn't know that was just about all the cash the company had available?

A. No, I have no knowledge of knowing that.

(Testimony of Charles J. Brown)

Q. You have been around the Abbot Kinney Company a long time and knew that \$30,000 in cash was almost an unheard of balance for the Abbot Kinney Company, didn't you?

Mr. Heap: I object to that as argumentative.

The Referee: Sustained. Proceed.

The Witness: I have no way of knowing what their balance—

The Referee: Never mind.

Mr. Davis: Q. After you received the \$30,000, Mr. Brown, what did you do with it?

A. I deposited it in the bank.

Q. Then what did you do with the money?

A. I gave \$10,000 to Eddie Gerety.

Q. You gave that to him by check? A. By check.

Q. What did you do with the balance?

A. I just left it in the bank.

Q. And how long did it remain in the bank?

A. It was never taken out of the bank until such time as I withdrew \$20,000 and put it up—

Q. That is when you deposited it with the Court?

A. That's right.

Q. Now who put up the \$10,000 that you used for the [97] purchase of the contract?

A. I put the money up myself.

Q. How much of that did John Harrah put up?

A. Not a cent.

Q. How much did William Harrah put up?

A. Not a cent.

Q. William Harrah acquired an interest in that contract, did he not? A. That's right.

(Testimony of Charles J. Brown)

Q. When did he acquire that interest

A. I sold him a half of my interest after I had received the \$30,000.

Q. And how did you come to sell William Harrah an interest in the contract?

A. Well, William Harrah—I believe that the new Board of Directors had made certain demands upon him or threatened him with lawsuits in regard to the old Plaza Building and he wanted something to kind of protect his interest in one thing and another. So he asked me about purchasing an interest in that balance of the contract, which he did; I sold him a half of my interest in it.

Q. A half of your interest. Now your interest—you had about two-thirds of eighty—

A. About fifty odd thousand.

Q. About fifty-two thousand, close to that figure?

A. Yes. [98]

Q. And half of that would amount to \$27,000?

A. That's right.

Q. So you sold a \$27,000 interest in a contract on which you had just received \$37,500 for how much?

A. \$3,000.

Q. You sold that for how much, \$3,000?

A. Yes.

Q. And you sold that because you wanted to help him out as against a possible lawsuit by Abbot Kinney Company?

A. Just a minute. I questioned whether I was going to be able to receive any more money on the balance of that contract. In view of the fact of the general condition

(Testimony of Charles J. Brown)

and all and on Mr. Williams' say-so—he said that he was going to spend the money as fast as possible on the pier so that there wouldn't be any money in the treasury.

Q. Now what did you say—

A. So if there wasn't any money to be had over there, I thought that would make a good deal.

Q. Why did Mr. Williams say that he was going to spend it on the pier? Was it because the pier needed it?

A. He said—about—I think the truth of it—what Mr. Williams told me was, he said that if he didn't spend it the Davis interests would take it all away anyway.

Q. As a matter of fact, you knew that Mr. Williams had gone in there and had ousted the Harrah interests, so to speak, because of actions taken by the Davis group, did you not? [99]

Mr. Kitzmiller: Now that is compound, unintelligible

---

The Referee: Sustained. Proceed.

Mr. Davis: Q. Did you know the condition of the pier? At the time you received this \$30,000 did you know the condition of the pier so far as repairs and the lack of repairs are concerned?

Mr. Cobb: We object on the ground that it is wholly immaterial. The conditions of the pier and the repairs have no bearing upon the issues in this case.

Mr. Davis: I think it goes to this, your Honor: that the pier was in desperate need of repair, had been for some time.

The Referee: How does that concern us, Mr. Davis?

Mr. Davis: And this money, if John Harrah and Carleton Kinney, who made up this Executive Committee,

(Testimony of Charles J. Brown)

were not interested in the contract, they would have spent in the repairs of the pier rather than throwing it away on a contract which had nothing paid on it since 1932. I believe it is material to show that.

The Referee: You can prove that by your own witnesses, not indirectly by this witness here.

Mr. Davis: This is not indirectly. This gentleman has been around the pier as much as anybody else.

The Referee: What does he know about the condition of the pier?

Mr. Davis: He knows as much as anybody.

The Referee: Sustained. Proceed. [100]

Mr. Davis: Q. Did William Harrah personally contact you about the purchase of an interest in the contract?

A. I believe his father had talked to me or said something to me—I had talked to him over the phone.

Q. You talked to William Harrah?

A. Yes, at Reno.

Q. He called you, did he?

A. I don't know whether he called me or I talked to him.

Q. But it was during one of those times you were doing some business with him, as I recall your testimony before?

A. I don't know about that. There was something come up anyway. So afterwards, why, I guess I talked it over with his father or his father previously talked to him about it.

Q. What did he say to you then?

A. The ultimate outcome was that they purchased it.

(Testimony of Charles J. Brown)

Q. What did Mr. William Harrah say to you about the possible purchase?

A. I forget just the telephone conversation.

Q. Well, approximately, as closely as you remember?

A. Well, he wanted to buy an interest in the contract in view of the fact of the action or something that had been brought against him; and I told him I was perfectly willing to sell him an interest in it; and ultimately he did settle it on the basis of \$3,000.

Q. Did you have a subsequent conversation over the telephone with him about it? [101]

A. No, his father settled it.

Q. I understand that—

A. His father settled the business.

Q. You had a conversation with his father, did you, about it?

A. I had a conversation with William Harrah.

Q. Then did you have any conversation with John Harrah about it?

A. After John Harrah had evidently discussed the thing with his son.

Q. And where did you meet John Harrah?

A. Oh, I possible met him along the street any time there. You can't go very far without meeting anybody in Venice. The sphere of activity is very limited.

Q. Well now, is it not a fact, Mr. Brown, that you never discussed this with John Harrah at all but that you carried on the entire transaction with William Harrah over the telephone?

A. No. I settled it with John Harrah.

Q. You finally settled it with Mr. John Harrah?

A. Yes.

(Testimony of Charles J. Brown)

Q. And what did Mr. John Harrah say to you?

A. Well, he said—he just come to the conclusion that \$3,000 would be satisfactory.

Q. Would be satisfactory to him or to you?

A. He agreed on \$3,000. And it was satisfactory to me, [102] and that was the consummating of the deal.

Q. What did you say to Mr. John Harrah about the possible purchase of the contract by William Harrah?

A. You mean to purchase that portion?

Q. Yes, what did you say to him and what did he say to you?

A. Well, William Harrah—I discussed that over the telephone with him; and he said that he had, I guess, been served with some papers. Is that right?

Q. I don't think so.

A. Or threatened, anyway, in some shape, form, or manner in regard to the suit that was pending, and in regard to the rental on the old Plaza Building, as I understood it. So that he wanted to fortify himself and have something to straighten out any claim after it arose.

Q. So then you proceeded to tell him that you would sell a half interest? A. A half of my interest.

Q. Of your interest for \$3,000?

A. That's what I did.

Q. And the assignment—

A. Which I considered good business.

Q. Did he prepare an assignment then to you; or did you prepare an assignment to him?

A. I did.

(Testimony of Charles J. Brown)

Q. By whom was that assignment prepared? [103]

A. I don't know whether—I don't know who prepared it. I think it might be Eddie LaCome or Mrs. LaCome.

Q. Do you recall, then, who prepared that assignment?

A. If I am not mistaken, I think Eddie LaCome typed it out over there in the office of the Bamboo Slide.

Q. Who dictated it, Mr. Pool?

A. I forget now.

Q. You don't recall?

A. I forget just exactly—I just forget exactly where it was done, whether—I don't know whether Pool was there—I think it was done in the office there of the Bamboo Slide.

Q. Did John Harrah prepare the issignment?

A. No.

Q. You are sure John Harah did not prepare it?

A. I think I answered it. I forget now. There was a terirble lot of detail continually about these things.

Q. And then what did you do with that assignment after you had it prepared?

A. I delivered it to John Harrah.

Q. Did you receive a check for it?

A. I don't know whether I received a check from William Harrah or \$3,000 in cash. I forget which.

Q. Well, how did you receive it? Was it sent to you by mail, or how did you receive it?

A. I think I received cash from John Harrah.

Q. You received cash from John Harrah? [104]

A. On delivering of the assignment.

(Testimony of Charles J. Brown)

Q. Where did Mr. Harrah get that cash, out of the safe we have been referring to?

A. I don't know where he got the money.

Q. Where did you make the delivery of the assignment?

A. I really don't know. I am not trying to be evasive, but I can't remember a lot of little details like that. I don't remember exactly where it was that I delivered—

Mr. Cobb: I understand that there is a check in the court room. If it was handled by check, we will produce it.

Mr. Mapes: It was a check.

The Witness: That's right. It was a check.

The Referee: All right.

Mr. Davis: Q. Now at the time you discussed with Mr. Harrah the possibility of buying this contract, what did he say about its value?

A. Now what are you referring to now, the tail end of the—

Q. Yes, at the time you made this assignment to Mr. William Harrah and you were discussing with John Harrah the contract, what did he say as to its value?

Mr. Kitzmiller: If anything.

Mr. Davis: Q. If anything.

A. I had already concluded that I was not going to be able to receive any great amount of money on the balance of the contract in view of the fact of the actions that had been [105] taken, and that I was perfectly satisfied with what I received for it. And from the general consensus of opinion, like I had talked to Mr. Williams and he had revamped everything and said he wanted to

(Testimony of Charles J. Brown)

spend everything as fast as it came in so that there wouldn't be any money in the treasury—

Q. What did Mr. Harrah say about it?

A. Well, evidently he thought that he bought something; or he wouldn't have advised his son to give me a check for \$3,000.

Q. So you went ahead and consummated it?

A. That's right.

Q. Did you talk to Mr. Eddie Gerety about selling the interest to Mr. William Harah?

A. Eddie had no interest in my two-thirds.

Q. Your answer is you did not talk to Mr. Gerety about it?

A. I believe I told him about it; but I don't believe I discussed it with him, because it wasn't any of his business.

Q. Well, as I understand it, the reason you did not think the contract had much value to you was because there had been a change in the directors of the Abbot Kinney Company?

Mr. Kitzmiller: Just a moment. I object to that on the ground that it assumes facts not in evidence.

The Referee: Sustained. Proceed. Anyway that is argumentative. Proceed.

Mr. Davis: I think that is all, your Honor.

The Referee: Mr. Cobb, do you want to cross examine; or [106] do you want to call him as your own witness?

Mr. Cobb: We will call him as our own witness, your Honor, later.

The Referee: Q. Mr. Brown, I want to ask you a question. A. Yes, sir.

(Testimony of Charles J. Brown)

Q. How did you know that there would be an Executive Committee meeting at the time when you appeared before the Executive Committee and asked for your \$30,000?

A. Well, prior to the time there was an Executive Committee they always sent out notices and it was always more or less discussed around the pier as a whole about when the meetings were going to take place, because at that particular time everything was really in such an upset condition amongst all the concessionaires. I think my gross business that year was about \$159,000, if I remember correctly. And naturally, why, through the graveyard and one thing and another the word circulates around about when the meeting is going to take place. And of course, when the new regime came in, most of the concessionaires were very upset about what somebody was going to do or what was going to take place.

Q. The Executive Committee consisted of three people, did it not, Mr. Brown?

A. At that particular time?

Q. Yes. A. Yes, I guess it did; that's right.

Q. Certainly if the Executive Committee was going to have [107] a meeting, they wouldn't send notices of the proposed meeting to anybody but the members of the Executive Committee, would they?

A. Evidently that leaked out, because somebody always said, "There's going to be an Executive Committee meeting." Or there was something like that. And there seemed to be no secret about these matters. They were held, I think, pretty regular.

(Testimony of Charles J. Brown)

Q. When you went down to Mr. Darling's office to consummate the assignment, how many checks did you take along?

A. I took two, and I think Mr. Gerety took two.

Q. Did you have Mr. Gerety's checks, or did he have some?

A. Mr. Gerety, if I remember, bought the last check over here at the Bank of Italy right over here (indicating) prior to our going up to Mr. Darling's.

Q. Now your two checks were for how much?

A. \$5,000 each.

Q. Why did you take two checks?

A. I drew \$5,000 out of my personal account, and I took \$5,000 out of my safe deposit box.

Q. You took \$5,000 out of your account in the Security— A. First National Bank.

Q. The Security-First National Bank of Venice?

A. Yes, sir.

Q. And that was a checking account?

A. Yes, sir. [108]

Q. Did you buy a cashier's check with it right there at the bank? A. Right there at that time.

Q. Made payable to yourself, was it, or to the Cruickshank Company?

A. I think it was made payable to myself; and I endorsed it, I believe, because in the receipt—

Q. Now your safe deposit box was in the same bank?

A. The same bank, yes, sir.

Q. And with respect to the time that you purchased the cashier's check with your withdrawal from your ac-

(Testimony of Charles J. Brown)

count for \$5,000, when did you buy the cashier's check with the \$5,000 you took out of your safe deposit box?

A. If I remember correctly, I think I bought them all at the same time.

Q. Yes. Well, what is your best recollection? Where are the safe deposit boxes in that bank? Are they on the same floor?

A. The same floor, back. It is the far north end of the bank.

Q. What did you do first, do you remember?

A. Well, now, that I just can't tell you which operation I done. But if I am not mistaken, I bought them both at the same time.

Q. No, that is not it, Mr. Brown. What did you do first? Did you complete the entire transaction on one visit to the bank? [109]

A. Well, now, I go to the bank two or three times a day—

Q. Yes.

A. —and I deposit in the bank. I deposit in the bank—I usually have a balance anywhere up to ten or twelve thousand dollars, thirteen thousand dollars, in the bank. I usually have cash on hand in my safe, oh, \$2500 or \$3,000, because I have to—I daily use about two thousand, over \$2,000 in cash.

Q. All right. Get back to the question. What is your recollection as to what you did that day?

A. Now I told you, Judge, to the very best and honest knowledge I can't tell you except that I know that I purchased two, because it wasn't anything extraordinary —there was no way for me to fix some particular situa-

(Testimony of Charles J. Brown)

tion on that particular day, because it's regular routine for me to go in and out of there all the time.

Q. But you don't buy cashier's check to the extent of \$10,000 very often? A. No, I don't.

Q. Well, frankly I would like to have you explain to me why you bought two cashier's checks.

A. Well, I think I bought—I think I bought—I bought—I bought—I drew a check for \$5,000, and I think I took the \$5,000 of the—or a portion of it anyway—out of my safe deposit box—with what I had taken out of the other safe of mine, which I had. [110]

Q. You have made the unqualified statement you took the \$5,000 out of your safe deposit box. Do you want to change that testimony?

A. Well, now, I don't want to change. I think to the very best of my knowledge I must have taken—whether I did or didn't, all I can tell you is that I bought two checks. And I drew one that I used in cash, and the other I drew out of my account. And by doing that it was all in the one operation.

Q. You say they sell cashier's checks at only one window?

A. No, they didn't. Down there they sell them at any window.

Q. Any window?

A. Yes, sir, any one of the windows from the Security-First National Bank at Venice.

(Testimony of Charles J. Brown)

Q. You can't buy cashier's checks at the safe deposit vault, can you, Mr. Brown? A. No.

Q. So the normal procedure would have been for you to take your cash to some window and make out a check for the balance of the money that you needed to draw from your account and buy a \$10,000 cashier's check. I want to know why you didn't do that?

A. Well, I can't give you a natural why one man walks on one side of the street and not on the other. I can't remember why I done that or why I bought them at the same [111] window.

The Referee: You may step down.

Mr. Davis: I think I can identify Mr. William Harrah's signature by this, your Honor.

Q. Mr. Brown, are you acquainted with Mr. William Harrah's signature? A. Yes.

Q. Is this his signature? A. Yes.

Mr. Davis: (Addressing counsel) Have you gentlemen seen this letter to the Abbot Kinney Company (showing a paper to counsel)?

I would like to introduce this as bankrupt's exhibit next in order, a letter date November 30th, Reno, Nevada, on the letterhead of which is "Reno Harrah's Bingo, the biggest little city in the world, Harrah's Bingo, 242 North Virginia." It is signed by William F. Harrah.

(Testimony of Charles J. Brown)

The Referee: It will be marked Bankrupt's Exhibit 6. One question, gentlemen: When was the money deposited in court? Does anybody know?

Mr. Davis: The exact date I don't, your Honor.

Mr. Pool: It was my check, your Honor. I will find out.

The Referee: Was it before or after November 30, 1944?

Mr. Pool: What was the date of our stipulation?

Mr. Davis: Yes, it was, because I think it was filed after I had left for Sacramento. [112]

Mr. Pool: It was after that stipulation was signed, just a few days. I want the date on that.

Mr. Heap: January 8th.

Mr. Pool: Then it was after January 8th. It was deposited pursuant to that stipulation.

The Referee: Is there anything else?

Mr. Davis: I think that is all.

Mr. Pool: Do you want the exact date, your Honor?

The Referee: No, I only wanted to know if it was before or after November 30, 1944. Very well. Go ahead, gentlemen.

Mr. Davis: I believe that is all.

The Referee: All right, step down, Mr. Brown.

(A short recess.)

Mr. Davis: Your Honor, I would like to recall Mr. Brown to the stand for a moment.

The Referee: All right.

CHARLES J. BROWN,

recalled for further

Direct Examination.

By Mr. Davis:

Q. Did you know Mr. John Harrah at the time the petition in bankruptcy was filed against him?

Mr. Cobb: To which we object on the ground that it is immaterial.

The Referee: Why don't you fix the time? [113]

Mr. Davis: I am—

The Referee: Overruled.

Mr. Cobb: It is a matter of public record.

The Referee: All right, do you know?

A. No, I don't.

Mr. Davis: Q. You knew that a petition in bankruptcy had been filed against Mr. John Harrah, did you not?

A. Yes, I knew that such a thing had; but I have no idea—I have no way of placing the time.

Q. You knew Mr. Harrah at the time that petition in bankruptcy was filed, did you not?

A. I have known Mr. Harrah 25 years.

(Testimony of Charles J. Brown)

Q. Now prior to the time that that petition in bankruptcy had been filed against Mr. John Harrah, had you ever worked for William Harrah? A. No.

Q. Your employment with William Harrah and your contact in a business way with John Harrah has all been since his petition in bankruptcy was filed?

Mr. Kitzmiller: Just a moment. I object to that. You have not set the date as to when this petition was filed.

The Referee: Overruled.

Answer the question.

The Witness: Well, I think William Harrah is about 34 years old, if I am not mistaken, or thereabouts. So if you take 25 from that, you can determine about his age, about the [114] first when I knew John Harrah.

Mr. Davis: Mr. Reporter, will you please read the question?

(The reporter read the following question: "Your employment with William Harrah and your contact in a business way with John Harrah has all been since his petition in bankruptcy was filed?"

Q. Do you understand that question, Mr. Brown?

A. Why, it must have been.

Mr. Davis: I think that is all.

The Referee: Step down. Come along, Mr. Harrah.

JOHN HARRAH,

called as a witness on behalf of the petitioning creditors, being first duly sworn, testified as follows:

The Referee: What is your name, sir?

A. John Harrah.

Direct Examination.

By Mr. Davis:

Q. What is your business, Mr. Harrah?

A. Why, I'm professionally an attorney. I have been in lots of businesses in my lifetime.

Q. Are you now practicing law?

A. Call it a restricted practice.

Q. Well, would you tell us what you are doing other than [115] practicing law, then?

A. Well, at the present time I'm watching the Abbot Kinney affairs as a director and am interested with my son, who has a large bond interest. Most of my activities at present are for other things for him. He calls me to Reno every couple of weeks about propositions he has there, and he sends me to Vancouver, Washington, every once in a while, where he has an interest up there.

Q. Do you have any businesses of your own that are in your own name?

A. I have no businesses of my own, in my own name or any one else's.

Q. And do you have any assets of your own in your own name?

A. I have no assets at all to any extent other than a little bit of money and personal effects.

(Testimony of John Harrah)

Q. Now have you carried on any business activities on your own behalf and in your own name since the petition in bankruptcy was filed against you?

A. No. That wasn't filed against me. That was a voluntary petition.

Q. Since you filed your petition in bankruptcy?

The Referee: Let us see when it was. When was it, Mr. Harrah?

The Witness: I think it was April 13, 1937.

Mr. Davis: That was the date of the filing of the petition? [116] A. Yes.

Q. And have you ever received a discharge in that proceedings? A. No.

The Referee: Q. Did you apply for a discharge?

A. Yes, I applied for a discharge.

Q. What disposition was made of the application?

A. A report was made on it by the Referee; and it never came up for a hearing before the Referee.

Q. What report did the Referee make?

A. The report was adverse.

Q. He recommended the discharge be denied, and the matter never came on for hearing before the District Court?

A. It was on calendar and then went off and then was reset and never did come on for rehearing.

Mr. Davis: Q. And at that time there was substantial evidence about your relationship with Charles Brown, was there not?

A. Very little. I never had but one business transaction with Charles Brown that came up there.

Q. What was the basis for the report of the Referee denying the discharge?

(Testimony of John Harrah)

Mr. Cobb: We object to that on the ground that the report would be the best evidence; it is incompetent, irrelevant, immaterial.

The Referee: Sustained. [117]

Mr. Davis: Q. Since that time you have devoted all of your time, effort, and energies to the business of your son, William Harrah?

A. No, no. No, I haven't.

Q. Have you had any source of income other than William Harrah's businesses? A. Yes, I have.

Q. What other activities have you carried on, Mr. Harrah?

A. Well, there was the practice of law. I did a general practice for a while, and—

Q. You have not maintained a law office, have you, Mr. Harrah, for many years?

A. Well, let's see, I haven't maintained an exclusive office ever. I have always done other things, but I am just trying to think and remember back how—when I started taking up general practice.

Q. You have not practiced law since I have known you, have you, Mr. Harrah, and that has been since 1937?

A. I was practicing at that time, 1937—1937? Let's see, no, I wasn't. I got started practicing again about 1932, when I went broke. And I tried to build up a practice and I worked at it rather exclusively for some time. And then I wasn't very successful in a financial way in my practice; so when my son's interests became more extensive, I started in to working for him. He put me on his payroll, I think, about, oh, perhaps 1935 or 1936, something like that. [118]

(Testimony of John Harrah)

Q. How long have you been connected with the Abbot Kinney Company?

A. Well, since I was appointed a director, December 23, 1927.

Q. And you have continuously been a director of the Abbot Kinney Company since that time?

A. Yes, I have.

Q. And you are a director of the Abbot Kinney Company now? A. Yes.

Q. You have opposed all of the proceedings, the authorization of any proceedings, to recover this money from Mr. Brown, have you not?

A. No, I have not.

Q. In all of the Board of Directors' meetings, whenever the question of voting came up on this litigation, you have voted against further action against them, have you not?

Mr. Cobb: We object to that on the ground first, that it is a compound question, second, that the minutes of each particular meeting and how the motion was worded would be the best evidence.

Mr. Davis: I will withdraw the question.

Q. Did you serve upon the Executive Committee of the Abbot Kinney Company? A. Yes, I did.

Q. And when were you appointed a member of that Executive [119] Committee?

A. Well, I think we have agreed it was 1940. I don't know whether it is correct or not, but it is as nearly as I can remember without checking up the record. I think you have the minutes of the Directors' meetings there, which would show.

(Testimony of John Harrah)

Q. I think that is close enough, January, 1940. Now who were members of the Executive Committee of the Abbot Kinney Company during the time you served on it?

A. I don't remember whether there was any change from the time I first got on it or not. I don't remember any. As far as I remember, they were the same three.

Q. Who are "they?"

A. Carleton Kinney, Al. Newton, and myself.

Q. How long did you serve as a member of the Executive Committee?

A. Well, I served until early in December last year, 1944.

Q. Now what authority did the Executive Committee have so far as the activities of the Abbot Kinney Company were concerned?

A. To carry on the business of the company between the meetings of the Board of Directors.

Q. And did the Executive Committee do that?

A. They did.

Q. Did they execute or authorize the execution of leases? A. Yes. [120]

Q. And authorized the payment of moneys?

A. Yes.

Q. Were you authorized to sign checks on behalf of the Abbot Kinney Company?

A. Yes, it required two signatures; and mine was one. At lease my own was one that was good. I don't know how many were authorized, but it required two signatures on a check.

Q. And Carleton Kinney was also authorized—

A. Yes, he was.

(Testimony of John Harrah)

Q. So that you and Carleton Kinney could sign checks on the Company? A. We could.

Q. You were an officer of the company in addition to being a member of the Executive Committee and a member of the Board of Directors, were you?

A. I was treasurer.

Q. How long were you treasurer of the company?

A. Well, I don't remember; several years.

Q. Now during the time you were a member of the Board of Directors of the Abbot Kinney Company, an officer, and a member of the Executive Committee of the Abbot Kinney Company, the Abbot Kinney Company claimed that your son William Harrah and your daughter Margaret Schroeder owed the company approximately between sixteen and eighteen thousand dollars on the Plaza Building; isn't that correct?

Mr. Cobb: We object to that on the ground that it is [121] incompetent, irrelevant, and immaterial; has no bearing on the issues in this case; and is not the best evidence.

The Referee: How is it going to help us, Mr. Davis?

Mr. Davis: Nothing other than to show, your Honor, that this was a general scheme which Mr. Harrah and Carleton Kinney worked out so that Carleton Kinney would get certain moneys, Mr. Harrah or his family would get certain moneys, and this was part of the pay-off—apparently, as we see it. We are trying to develop it from the things that they did. As you know, a conspiracy is sometimes shown and most often shown by the circumstances. We are going to show that John Harrah voted, as a member of the Executive Committee, to settle an obligation of his daughter and his son to the company of

(Testimony of John Harrah)

between sixteen and eighteen thousand dollars, an obligation which he went out and paid \$6200 for—and at the same time voted to allow Carleton Kinney to pay off an indebtedness of \$1500 for a bond which he paid around \$625 for, and that then this bond transaction came along and Mr. Carleton Kinney and Mr. John Harrah voted down the line. I think it is all part of the chain of circumstances.

Mr. Kitzmiller: To which we are going to object. And in making the statement in regard to this so-called conspiracy—

The Referee: Counsel, you know very well, as a lawyer, that statements are not evidence. Make your objection.

Mr. Kitzmiller: I object to it, then, on one further ground, that such a transaction would not tend to prove any- [122] thing because Mr. Davis has done the same thing with regard to bonds. As long as attorneys are going to give evidence here—

The Referee: I wish you gentlemen would behave yourselves like lawyers and not litigants. If you have made a legal objection, it will be sustained. Proceed.

Mr. Davis: Q. Are you acquainted with Hugh Darling? A. I used to be.

Q. When did you first meet Hugh Darling?

A. I think I first met him about the time that I went on the Board of Directors. He was representing the Cruickshank Company at that time.

Q. Mr. Darling is a lawyer and a member of the firm of Guthrie and Darling, as I understand it?

A. I don't know his firm. I know he is an attorney.

(Testimony of John Harrah)

Q. Now he represented Cruickshank and Company?

A. Call it Red West. A man they called Red West owned Cruickshank, and Hugh Darling represented him.

Q. At the time you met Mr. Darling, how much money was owed on the sprinkling system contract?

A. I think \$137,000 and some accrued interest, is my recollection.

Q. How long had that \$137,000 been owed on the contract?

A. I don't remember that. I don't know the date of the last payment. The last payment was before I was on the Board of Directors. [123]

Q. Well, as a matter of fact, Mr. Harrah, you know of your own knowledge, by subsequent investigation, that nothing had been paid on the contract since about 1932; isn't that so?

A. I never investigated it. I knew that nothing had been paid after—I went on the Board of Directors. I didn't know when the last payment was.

Q. You recall that, when Mr. Darling came before the Board and requested a renewal and execution of that supplemental agreement, he stated nothing had been paid on it for many years; do you recall that?

A. Well, I don't recall what was said at that time. I recall that he came before the Board and that somebody had a supplemental agreement prepared which was submitted and it was considered by the interested parties at the time they were contemplating signing an agreement regarding \$196,000 in bonds which were owned by Frank Williams, Robbins, and William Harrah and certain corporate stock on the Abbot Kinney Company which you and your brother and, I believe, Mr. Al. Newton owned—

(Testimony of John Harrah)

or perhaps your father instead of you; and it was embodied in that contract that that would not be effective unless Cruickshank and Company executed their supplemental agreement within 30 days, as I remember—and that was setting up new terms of payment, was the principal item in it—and of course renewing the obligation then so far as the statute of limitations was concerned.

Q. Do you recall when the reorganization of the company [124] took place pursuant to that agreement of December 23, 1937, that Mr. Darling went on the Board of Directors—

A. He went on the Board of Directors, but there wasn't any reorganization of the company.

Q. I said pursuant to that agreement. At the time you went on the Board, then.

A. My recollection is Mr. Darling went on about that same time, possibly the same day. He went on to represent the Cruickshank interests.

Q. And Mr. Darling demanded payment many times on account of that sprinkling system contract, did he not, during the time he was on the Board of Directors?

A. I don't remember of him ever making any formal demand; but he often brought it up and discussed it with the directors as to when he could get some money paid on it.

Q. As a matter of fact, every meeting Mr. Darling attended virtually, he wanted to know when we were going to pay something on account, did he not?

A. I don't remember it that way. As I remember, he was very, very conscientious and very interested in all the affairs of the company as a director.



